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EDITOR'S NOTE

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ocketed:
anuary 16, 1986

Title: Fall River Dyeing & Finishing Corp., Petitioner
v.
National Labor Relations Board

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Drogin, Ira

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 16 1986	G	Petition for writ of certiorari filed.
3	Feb 24 1986		Order extending time to file response to petition until March 23, 1986.
4	Mar 24 1986		Order further extending time to file response to petition until March 31, 1986.
5	Mar 31 1986		Brief of respondent NLRB in opposition filed.
6	Apr 2 1986		DISTRIBUTED. April 18, 1986
8	Apr 21 1986		REDISTRIBUTED. April 25, 1986
9	Apr 24 1986	X	Reply brief of petitioners Fall River Dyeing, etc. filed.
11	May 5 1986		REDISTRIBUTED. May 15, 1986
13	May 16 1986		REDISTRIBUTED. May 22, 1986
14	May 27 1986		Petition GRANTED.
			**********
16	Jun 30 1986		Order extending time to file brief of petitioner on the merits until August 11, 1986.
17	Aug 8 1986		Brief amicus curiae of Legal Foundation of America filed.
18	Aug 11 1986		Joint appendix filed.
19	Aug 11 1986		Brief of petitioner Fall River Dyeing, etc. filed.
20	Aug 11 1986		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
22	Aug 28 1986		Order extending time to file brief of respondent on the merits until October 11, 1986.
23	Oct 11 1986		Brief of respondent NLRB filed.
24	Oct 11 1986		Brief amicus curiae of AFL-CIO filed.
25	Oct 22 1986		CIRCULATED.
26	Dec 19 1986		SET FOR ARGUMENT. Monday, March 2, 1987. (1st case).
27	Feb 21 1987	X	Reply brief of petitioner Fall River Dyeing, etc. filed.
28	Mar 2 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-1208

Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FALL RIVER DYEING & FINISHING CORP.,

Petitioner,

– against –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board and the Court of Appeals have failed to follow Federal labor policy contained in successorship principles previously enunciated by this Court and have promoted concepts contrary to the Labor Management Relations Act, as Amended, under the totality of the circumstances herein, by finding that there was a substantial continuity in the employing enterprise, between a collapsed and liquidated business, Sterlingwale Corp., and a new enterprise, petitioner, Fall River Dyeing & Finishing Corp., such as to require Fall River to recognize and bargain with a Union which represented the production and maintenance employees of the former employer, Sterlingwale.

2. Whether the National Labor Relations Board and the Court of Appeals have failed to follow the successorship principles previously enunciated by this Court and have promoted concepts contrary to the Labor Management Relations Act, as Amended, and Federal labor policy, by relying on and applying simultaneously two Board-promulgated legal concepts, to find that Fall River Dyeing & Finishing Corp. engaged in unfair labor practices in violation of Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Textile Workers of America, AFL-CIO, Local 292, without a further demand having been made by that Union, after Fall River subsequently employed a substantial and representative complement of employees, a majority of whom had been employed by a former employer, Sterlingwale Corp. Those concepts are:

(a) The substantial and representative complement standard under which the time of determination of whether a new employer is a successor is postponed until its work force reaches a substantial complement, representative of the number and type of employees and job classifications, that will ultimately constitute the appropriate bargaining unit, without considering whether under the circumstances of this case, the time when the new employer reached a full complement of employees and classifications should have been determinative.

(b) The continuing demand doctrine, whereby in this case, the Union's demand for recognition and bargaining, once made but lawfully rejected by Fall River, was nevertheless considered to be ongoing in nature, for approximately three months thereafter, until Fall River first employed a substantial and representative complement of employees, even though, to have accepted the Union's premature demand theretofore, would have constituted the unlawfuly recognition of a minority Union in violation of the Labor Management Relations Act, as Amended.

3. Whether the National Labor Relations Board and the Court of Appeals, in requiring Fall River to bargain with the Union, by applying both the continuing demand concept to a premature bargaining demand and the representative complement standard, to cause a bargaining obligation to become effective at that time, have deprived the employees of Fall River of their rights under the Labor Management Relations Act, as Amended, to bargain collectively through representatives of their own choosing and to refrain from any and all such activities, and have improperly compelled Fall River to bargain with the Union where a good faith doubt existed as to the Union's majority status.

PARTIES TO THE PROCEEDING BELOW

The only other parties to the proceedings below not listed in the caption are:

1. United Textile Workers of America, AFL-CIO, Local 292.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FALL RIVER DYEING & FINISHING CORP.,

Petitioner,

– against –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Fall River Dyeing & Finishing Corp., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on October 18, 1985, enforcing an Order of the National Labor Relations Board (hereinafter "NLRB") requiring Fall River Dyeing & Finishing Corp. (hereinafter "Employer" or "Fall River") to recognize and bargain with United Textile Workers of America, AFL-CIO, Local 292, as the exclusive representative of all the production and maintenance employees of the Employer's plant in Fall River, Massachusetts.

OPINION BELOW

The opinion of the Court of Appeals enforcing an order of the NLRB, made on October 19, 1984, is reported at ____ F.2d ____ (1st Cir. 1985), 120 LRRM 2825, and ____ CCH ____ .

The Decision and Order of the three-member panel of the National Labor Relations Board, dated October 19, 1984, adopting the Decision and Order of Administrative Law Judge Burton S. Kolko, issued January 27, 1984, is reported at 272 NLRB No. 127, 117 LRRM 1436, 84-5 CCH ¶ 16780.

The Court of Appeals and administrative law decisions appear in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals, granting enforcement of the NLRB Order was entered on October 18, 1985. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case concerns the provisions of the Labor Management Relations Act, as Amended, 29 U.S.C. Sections 151, *et seq*. For the Court's convenience, the following sections are set forth in the Appendix to this Petition:

Section 8(a) (1), 29 U.S.C. Section 158(a) (1) - App. p. A-44

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Section 9(a), 29 U.S.C. Section 159(a) - App. p. A-44

STATEMENT OF THE CASE

On February 12, 1982, Sterlingwale Corp. (hereinafter "Sterlingwale"), a corporation owned by the Ansin family for 30 years, began an immediate voluntary liquidation, shutting down its textile dyeing and finishing operation in Fall River, Massachusetts, and indefinitely laying off all of its production and maintenance employees. The closing was the result of unquestionable dire economic circumstances, involving the loss of millions of dollars. The Sterlingwale employees had been represented since 1968 by United Textile Workers Union of America, AFL-CIO, Local 292 (hereinafter "Union"), under a series of collective bargaining agreements, the last of which was due to, and did, expire April 1, 1982. The collective bargaining agreements contained standard Union security provisions permitted by Section 8(a) (3) of the Labor Management Relations Act, as Amended (the "Act").

During the liquidation, Sterlingwale retained a skeleton crew to maintain the equipment and ship out pending orders. However, in the summer of 1982, all business activity ceased, an outside liquidator was brought in and an assignment for the benefit of creditors was made, and a foreclosure was held at public auction on the premises occupied by Sterlingwale. The petitioner Employer acquired most of Sterlingwale's machinery, furniture and fixtures and part of Sterlingwale's remainaing inventory and materials, all at public auction. Sterlingwale's real property was acquired in late August, 1982 by Marcamy Sales Corporation, the parent corporation of Fall River Dyeing & Finishing Corp., which leased from its parent part of the real property formerly occupied by Sterlingwale.

The Employer did not acquire any other assets of Sterlingwale, such as its trade name, good will, or customer lists, nor did it assume any of Sterlingwale's liabilities. The Employer did not obtain any personnel records or employee lists of Sterlingwale's former employees.

In September, 1982, the Employer publicly advertised for employees in local newspapers. By September 20, 1982, it had hired six or eight employees and commenced preliminary start-up operations in one of three former Sterlingwale buildings. The preliminary operations involved cleaning, relocating and repairing machines for about four to six weeks, and thereafter, working on experimental production to ensure that everything was in order.

The Employer planned to engage solely in commission work which consists of the dyeing and finishing of fabric belonging to others for a commission. In contrast, Sterlingwale had been primarily a "converter" whose business consisted of approximately sixty to seventy percent processing of its own fabric and thirty to forty percent commission finishing. At the time of its demise, Sterlingwale employed in excess of 150 production and maintenance employees who worked three shifts.

Fall River's production plan was to commence operation with a single shift of fifty-five to sixty employees and then to expand fully to a two 10-hour shift operation employing 106 to 109 employees by April, 1983. Such a two-shift operation is almost essential to the production process because the fabrics emerge from the process wet, and the entire operation, including drying, cannot be completed in eight hours.

On October 19, 1982, the Union sent the Employer a letter, stating that "pursuant to the agreement between Sterlingwale" and the Union, the Union demanded recognition. The letter also stated that on October 28, 1982, a Union representative would call upon the Employer "for the purpose of negotiating a collective bargaining agreement." The agreement referred to by the Union had expired by its own terms April 1, 1982, and Sterlingwale had ceased normal production operations on February 12, 1982.[1]

[1] This was the only request or bargaining demand made by the Union up until the decision of the National Labor Relations Board Administrative Law Judge on January 27, 1984.

At the time of the Union's request and bargaining demand, the Employer employed 21 employees, 18 of whom were former Sterlingwale employees.

On October 21, 1982, the Employer's counsel wrote to the Union, advising that the Employer did "not intend to comply with [the Union's] request; and further . . . that there was no legal basis for same."

On November 1, 1982, the Union filed an unfair labor practice charge against the Employer claiming that the Employer had violated Sections 8(a) (1) and (5) of the Act. By mid-November, the Employer had hired employees in virtually all job classifications. They were engaged in start-up operations, cleaning and repairing machines for the first four to six weeks, and for the next four to five weeks, they engaged in experimental production on old Sterlingwale inventory.

On December 21, 1982, the Regional Director of the National Labor Relations Board, Region 1, issued a complaint charging the Employer with violating Sections 8(a) (1) and (5) of the Act because "on or about October 21, 1982, and at all times thereafter, respondent did refuse and continue to refuse to meet and bargain collectively, with the Union as the exclusive representative of all the employees in the unit." A hearing was scheduled for May 2, 1983.

The Employer answered the complaint on January 4, 1983, in substance denying that it was a successor employer to Sterlingwale, or that it had violated Sections 8(a) (1) and (5) of the Act.

In mid-January, 1983, the first shift was in full operation and a second shift was begun, with a total complement of fifty-five employees, approximately thirty-six of whom were former Sterlingwale employees. Some eight to twelve former supervisors of Sterlingwale were employed by the Employer as supervisors, and Herbert Chace, the Vice President of Sterlingwale, basically involved with its sales until its demise in February, 1982, was rehired as the Employer's Vice President running the plant and labor relations. Alfred Canuel, the Plant Manager of Sterlingwale, was

not rehired. Arthur Friedman, the President of the Employer, takes no part in the production or labor relations aspects of the Employer and is involved with the financial end of the business.

The Employer continued to hire and expand until it reached the goal of a full complement of employees in mid-April, 1983, consisting of 106 to 109 employees working two 10-hour shifts. By March 24, 1983, former Sterlingwale employees were a minority of the employees in the production and maintenance unit. By the time of the hearing, over one-half of the dollar volume of the Employer's business came from the same customers with which Sterlingwale had at some time done business.

The hearing began on April 2, 1983. In his Decision, the Administrative Law Judge held that the Employer had violated Sections 8(a) (1) and (5) by refusing to recognize and bargain with the Union on January 15, 1983. He held that the Employer was a successor to Sterlingwale, and that the Union's October 19, 1982 bargaining demand was premature when rejected by the Employer on October 21, 1982 since the Employer did not have a representative complement of employees, but that the demand was a continuing one, that the Employer was bound to comply with at such time as its operations reached a "representative complement, not a full complement." He then ruled that the Employer's duty to bargain with the Union attached in mid-January, 1983, and he ordered the Employer to bargain with the Union, "upon request of the Union."

The National Labor Relations Board by a vote of two to one adopted the Decision in toto. The dissenting member, Hunter, pointed out that at the time the Union made the demand on October 19, and the Employer refused it on October 21, the Employer did not employ a representative complement of unit employees, and, since the Union did not renew its bargaining demand at a time when the Employer had reached a representative complement—mid-January, 1983, he could find no bargaining obligation. Member Hunter, in essence, rejected the "continuing demand" concept of the majority, under the assumptions of the case.

The National Labor Relations Board petitioned the Court of Appeals, First Circuit, for enforcement under Section 10(e) of the Act, as Amended, 29 U.S.C. 160(e), which was granted by a divided Court with one judge dissenting. The issues involved were of first impression in the First Circuit, and are of nationwide importance to both labor and management, and it is believed have not been passed upon by the Supreme Court.

REASONS FOR GRANTING THE WRIT

THE NLRB HAS IGNORED OR REFUSED TO FOLLOW IN THIS CASE THE SUCCESSORSHIP PRINCIPLES PREVIOUSLY ENUNCIATED BY THIS COURT

This case involves important questions involving rights of both employees and employers in the area of successorship where there presently exists considerable uncertainty. In large measure this uncertainty has been caused by the NLRB which has disregarded the decisions and precepts of the Supreme Court relating to successorship and is promoting concepts that are clearly contrary to the Labor Management Relations Act. It is respectfully urged that the Supreme Court grant certiorari and review the circumstances of this case as well as the NLRB's substantial and representative complement and continuing demand concepts, so that the Court can provide the guidance necessary to the NLRB and resolve questions that are of great importance to large numbers of workers and prospective employers.

(1)

The traditional test for determining successorship is whether there is substantial continuity between the employing enterprises. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In making this determination, it is necessary to analyze whether there has been a change in the essential nature of the enterprise. *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (CA 1), *cert. denied*, 429 U.S. 921 (1976); *NLRB v. Middleboro Fire Apparatus*, 590 F.2d 4 (CA 1, 1978). This question is highly fact specific. As this Court noted in *Howard Johnson Company v. Detroit Local Joint Executive Board Hotel and Restaurant Employees Union*, 417 U.S. 249, 256 (1974), "...in light of the difficulty of the successorship question ... emphasis on the facts of each case as it arises is especially appropriate."

The facts in this case are not disputed, but the NLRB has ignored the standards set forth by the Court in *NLRB v. Burns*, *supra*, and other leading cases and has arranged the facts and

weighted them in such a way as to ignore, or give little or no weight to certain facts while at the same time stressing other facts which are not dispositive of the issue whether there has been substantial continuity between employing enterprises.

It is submitted that the circumstances herein clearly demonstrate an essential change in the employing enterprise, which precludes Fall River from being considered a successor, and that substantial changes between Sterlingwale, the collapsed employer, and Fall River's new operation exist and have been overlooked by the NLRB. In effect, the NLRB has not evaluated Fall River's new operation taking into account the totality of the circumstances.

In light of the importance of the need to know all of the relevant facts to reach a successorship determination, the Court must examine the nature of the new and old employing enterprises in order to interpret the principles of successorship which it has previously enunciated, and not automatically defer to the NLRB's expertise in labor matters. See *International Association of Machinists and Aerospace Workers, AFL-CIO (Boeing Company) v. NLRB*, 595 F.2d 664, 673 n.41 (C.A.D.C., 1978), *cert. denied*, 439 U.S. 1070 (1979) where the Court stated, in successorship cases, "deference to the Board may ordinarily be less appropriate." See also *NLRB v. Band-Age, Inc.*, *supra*, at p. 1.

The traditional criteria considered by the Courts for the test for determining whether there is a substantial continuity in the employing enterprise include:

1. Business operations;

2. Whether the same physical plant is used;

3. Whether the same or substantially the same work force is used;

4. Whether the same jobs exist under similar working conditions;

5. Whether the same supervisors are employed;

6. Whether the same machinery, equipment and methods of production are used; and

7. Whether the same product is manufactured or the same services offered.

See *Aircraft Magnesium, a Division of Grico Corp.*, 265 NLRB 1344 (1982), enf. 730 F.2d 767 (CA 9, 1984)(table); *Premium Foods, Inc.*, 260 NLRB 708, *enf.* 709 F.2d 623 (CA 9, 1983); *NLRB v. Middleboro Fire Apparatus, Inc., supra.*

Prior Court cases and applicable NLRB law have established that not one of the foregoing traditional factors by itself is determinative of the question whether there has been a substantial continuity in the employing enterprise. *NLRB v. Middleboro Fire Apparatus, Inc., supra; NLRB v. Hudson River Aggregates, Inc.*, 246 NLRB 192 (1978), *enf.*, 639 F.2d 865 (CA 2, 1981). The NLRB must weigh the singular facts relating to the enterprise and determine if there is a continuity of employing enterprise.

It is undisputed that Fall River ceased operation and went out of business for economic reasons. It is also undisputed that Fall River is a separate legal entity than Sterlingwale with different ownership, financing, etc. The NLRB does not claim, nor is there any evidence, that Fall River's business operation is an alter ego of Sterlingwale, or has any ownership links to the failed company.

Significantly, Fall River acquired neither the trade name, good will nor other assets from Sterlingwale. It assumed none of Sterlingwale's liabilities. There was no transfer of employee personnel records between Sterlingwale and Fall River, no direct transfer of any employees or personnel, and there was no expectation by Sterlingwale's employees of employment by Fall River. It is submitted that the employment of individuals who formerly worked for Sterlingwale resulted from factors unique to a small town with a shrinking industrial base. Many of the employees who had been permanently laid off by Sterlingwale in February, 1982, eagerly applied for positions at a new mill opening in their city. Production and maintenance employees were all hired on the open market from advertisements. Their employment started after

a minimum of seven months had passed since their termination by Sterlingwale; in some cases, 11 months had passed since indefinite layoff by Sterlingwale.

In the instant case, Fall River began its operation by leasing only one of Sterlingwale's three buildings from a company which had purchased the real property from the defunct firm at foreclosure sale. Although Fall River uses machinery and equipment which at one time may have belonged to Sterlingwale, it too was purchased on the open market at a foreclosure sale. Thus, the fact that the physical plant and equipment once were a part of Sterlingwale's operation should be totally irrelevant to the successorship determination. Furthermore, with regard to the issue of workforce, a textile business, whether operating on a converter or a commission basis, will have employees working in similar job classifications. This is not a controlling factor considering the nature of any textile operation. However, there remains a substantial dissimilarity in working conditions and operations not factually disputed, but not referred to or commented upon by the NLRB. This disparity in working conditions has to do with the shifts. Rather than operating on the basis of three shifts a day, Fall River intended to run its plant when at full complement, with only two 10-hour shifts. The new firm also employed no sales force.

It is submitted that the nature of Fall River's business is fundamentally different from that of Sterlingwale's. While the former operation depended largely on converting, Fall River's operation relies solely on commission work. A commission business does not require the capital necessary to purchase fabrics or the need for a sales force or a retail outlet to sell them. Fall River operates in a significantly different mode than Sterlingwale. It has a smaller manufacturing plant, substantially less employees (workers and supervisors), fewer work shifts and longer working hours.

Furthermore, there has been no transfer of customer lists or customers between Sterlingwale and Fall River which might justify the NLRB's conclusion there was a substantial continuity

of business operations. It is submitted that many former Sterlingwale customers who also became Fall River customers were acquired by competing for them in the open market. Although the NLRB considered that in dollar volume over one-half of Fall River's Customers had been customers of Sterlingwale, the NLRB ignored the fact that one of the major customers is Fall River's parent company, Marcamy Sales. If its purchases are considered, the portion of continuing customers drops to one-third.

The NLRB, in making its analysis of the factors needed to find successorship, has entirely neglected the differences in concept between the two operations. The NLRB has taken too narrow a view of the business operation as a factor in the overriding question of whether there is substantial continuity in the employing enterprise. See *NLRB v. Alamo White Truck Services*, 273 F.2d 238 (CA 5, 1959). The services offered by Sterlingwale were essentially in the conversion process, although admittedly some commission work was done as it became short of cash to purchase textiles to convert for its own account. In contrast, finishing work is the exclusive business of Fall River. Fall River's sole intention is to earn commissions as a finisher where Sterlingwale failed in a business involving primarily converting. There was no basis for the Administration Law Judge and NLRB to ignore the basic differences in the textile industry with regard to finishing work and make a finding based on dollar volume alone that "...a substantial part of Respondent's business is linked with Sterlingwale." (App p.37)

The alleged links between the two enterprises are too tenuous to support the NLRB's finding of successorship. As demonstrated above, there is a substantial difference in the scale and nature of operations which precludes the finding of successorship in the circumstances of this case.

(2)

While there is no single factor which will prevent a finding of successorship, the following factors when combined have defeated such a finding:

1. A long hiatus in the resumption of operations;

2. A difference of location at the resumed operation;

3. A changeover of the supervisory hierarchy;

4. The absence of a carryover of customers or markets supplied; and

5. A difference in the scale of the operations and the products produced and in the method of production, etc.

See *Radiant Fashions, Inc.*, 202 NLRB 938 (1973); *Galis Equipment Co.*, 194 NLRB 799 (1972); *Georgetown Stainless Manufaturing Corp.*, 198 NLRB 234 (1972); *Cagle's Inc.*, 218 NLRB 603 (1975); *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), *enf.* 498 F.2d 680 (C.A.D.C., 1974); *Lincoln Private Police*, 189 NLRB 717 (1971); *Co-op Trucking Co.*, 209 NLRB 829 (1974).

The NLRB has found the continuity of the employing enterprise destroyed where the continuity, other than that of the work force, consisted primarily of the acquisition of a portion of the customers of a moribund company solicited in the open market. *Co-op Trucking, supra; Lincoln Private Police, Inc., supra.*

In the case at bar, we find a major changeover in the supervisory hierarchy. The number of supervisors has been substantially reduced from 18 to 12, including employment of 4 new supervisors who had not been previously employed by Sterlingwale. The former plant manager has been terminated and not rehired by Fall River. Likewise, as noted above, there is a substantial change in the firm's market, suppl..rs and customers. The market is no longer the conversion and sale of goods owned by the processor. The market now consists of processing the goods of others as a commission dye house and not direct sale of its own product line. With regard to customers, only about one-third of Sterlingwale's customers are serviced by the Employer exclusive of Fall River's parent corporation. Furthermore, as a result of

a hiatus in any production of at least 7 months, there was not any carryover or transference of customers that might justify linking the two employers.

Finally, Sterlingwale's employees had no reasonable basis for anticipating that their employment might resume at the same location after their indefinite layoff began in February, 1982. The substantial hiatus in any operations from mid-February, 1982 until mid-September, 1982, as well as the foreclosure sale on the physical plant and equipment, negates any reasonable expectation by former Sterlingwale employees that they would resume their old jobs. Their union contract expired in April, 1982, and their Union made no effort to renew it.

It is submitted that the NLRB has erred in ignoring the significance of the lengthy hiatus on the employees' expectation of rehire. In *Aircraft Magnesium, a Division of Grico Corporation, supra*, a case involving a hiatus between the prior operator and a new employer, the NLRB held, at p. 1346: "Further, the significance of a hiatus to successorship status is its effect on the employees' expectation of rehire." Unlike the present case, in *Aircraft Magnesium* the employer desired in reality to continue in the predecessor's business. In that case, after a bankruptcy and a layoff of bargaining unit employees, there was a hiatus of operations of less than one month during which Aircraft Magnesium purchased not only all the physical assets of its predecessor, but its books and records, including customer lists, invoices and operating permits. There was a stipulation that a majority of the customers and suppliers remained the same. The new company expressed interest in rehiring all of the predecessor's employees the day after the purchase was complete and subsequently carried out that intention by hiring them.

In the instant case, such an intent is totally absent. The record here shows no intent to hire former employees; the Employer ran a newspaper ad in the community paper in order to begin staffing the new enterprise.

The facts underscore that the employees who responded to newspaper advertisements and applied for a job with Fall River were in actuality applying for a new job, under new management at a different mill serving different customers and a changed market. In light of the substantial changes in the employing enterprise discussed above, this Court should determine that the NLRB's cursory review incorrectly applied the law to the facts. It is respectfully submitted that this Court should grant certiorari and review whether or not the successorship principles enunciated by this Court in *Burns, supra*, and other cases have been followed by the NLRB, or whether they have been ignored or misapplied.

THE NLRB'S SUBSTANTIAL AND REPRESENTATIVE COMPLEMENT STANDARD AS APPLIED IN THIS CASE CONTRAVENES IMPORTANT REPRESENTATION RIGHTS GUARANTEED EMPLOYEES UNDER THE LABOR MANAGEMENT RELATIONS ACT, AS AMENDED

In finding Fall River to be a successor employer in this case and thereby bound to recognize and bargain with a Union which represented employees of a former employer, without allowing those employees the right to express their choice of bargaining representative, the Board and the Court of Appeals have stretched the successorship concept to an unreasonable extreme. This Court, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), gave as a basis for a finding of successorship obligations the need to grant some protection to employees from a sudden transformation of their employer's business, which leaves intact significant elements of that business, but which results in the substitution of a new legal entity, not bound by the collective bargaining agreement under principles of contract law. Another consideration frequently advanced by this Court for the application of the successorship doctrine has been the need for continuity in industrial labor relations and the concomitant avoidance of industrial strife, which presumably follows from such a continuity. Thus, the successorship doctrine presents a conflict between the preservation of industrial peace and the right of the majority of employees to determine their bargaining agent, which right the Act was designed to preserve. In the case at bar, where the relationship between the first employer and the second employer is as attenuated as it is here and the employees of the first employer had no reasonable expectation to ever again become employed by Sterlingwale, which had a bargaining relationship with the Union at the time of their termination, the right of free choice of bargaining representative guaranteed those employees by the Act is undercut by the result reached here by the NLRB and Court of Appeals.

In *NLRB v. Burns International Security Services, Inc.*, *supra*, the Court held that if after a change in ownership, the essential

nature of the entity remains unchanged, and a majority of the new firm's employees or management were employed by the predecessor company, the new employer is considered the old employer's "successor". As such, the new employer must recognize an incumbent union which demands recognition and deal with it as the bargaining representative of the employees. See also, *NLRB v. Band-Age, Inc.*, *supra*.

In a successorship situation, the bargaining obligation can normally be determined at the time of transfer of ownership or when actual operations began. In other instances, such as this case, where the Employer is slowly hiring its work force as production begins, or where an employer is attempting to start a new business operation, a delay in making the determination may be appropriate. Thus, this Court stated in *NLRB v. Burns International Security Services, Inc.*, *supra*, at p. 295:

> "In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a Union, since it will not be evident until then that the bargaining representative represents a majority of the employees as required by Section 9(a) of the Act...."

It is respectfully submitted that this "full complement" principle for determining the critical measuring date has been treated as *dicta* by the majority of the Court of appeals (App. p. A-11), which stated that fixing the appropriate date "involves balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible" (App. p. A-10), and then, without examining the rationality of its application to the facts of this case, and engaging in no balancing at all, or analysis of any attempt by the NLRB to engage in balancing, simply stated that "These interests are effectively reconciled in the "substantial and representative complement" standard applied by the Board in this case." (App. p. A-10).

The NLRB made no attempt to engage in any balancing of the aforementioned objectives. The NLRB Administrative Law

Judge, without analysis, and relying upon the sole authority of the NLRB's decision in *Aircraft Magnesium, a Division of Grico Corp., supra*, mechanically stated, "However, the standard to be used indicated by the Board is representative complement, not full complement." (App. p. A-38).

Hence the NLRB has completely ignored any attempt to balance the objectives of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible. Apparently the NLRB has utterly disregarded this Court's concern in a successorship case, that there are situations where a duty to bargain may not attach until a full complement has been hired, and the bargaining agent represents a majority of the employees.

In this case, the distinction between the substantial and representative complement date and the full complement date is critical because the Union did not represent a majority at the full complement date, but did represent a majority at the substantial complement date. This determination must be based on a reasoned analysis and not an arbitrary statement that the substantial complement date is to be applied without any consideration being given to applying a full complement date.

In the case at bar, the NLRB has arbitrarily fixed January 15, 1983 as the date to determine whether the Employer's work force is composed of a majority of former Sterlingwale production and maintenance employees. It selected the date by mechanically following the substantial and representative complement principle applied by the NLRB in the *Aircraft Magnesium* case. In *Aircraft Mangesium, supra*, at p. 1345, the NLRB stated:

> "It is well settled that the significant time frame for determining what percentage of a purchaser's employees were former employees of a predecessor is when a demand for bargaining has been made and a representative complement of an employer's work force is on the job."

No such standard has been formulated or approved by this Court. The last word on the critical measuring date was in the *Burns* case in which the Court expressed its concern that there are situations when the measuring time frame should be at a point when there is a full complement of workers.

We submit that there is no justification in the case at bar to ignore the clear concern of the Supreme Court for the representation rights of employees. The instant case is precisely one of the situations referred to by the Court in *Burns*, particularly when we consider the substantial differences between Burns and Fall River that militate in favor of Fall River and demonstrate a good faith doubt with regard to the Union's majority status. Those major differences are, the lack of any expression of union preference by the employees for many years (Fall River) versus a recent election and certification (Burns), the nonexistence of a labor contract (Fall River) in contrast to one in effect (Burns), the start up of a new business entity after a substantial hiatus following the liquidation of the original employer (Fall River) versus a continuity of operations (Burns).

The NLRB has not, under the circumstances of this case, followed the policies contained in Section 9(a) of the Act, by imposing the Union on the employees of Fall River, a minority of whom were represented by the Union while employed by Sterlingwale as of the full complement date, by mechanically asserting that the substantial and representative complement date is effective to determine majority representation.

THE NLRB'S CONTINUING DEMAND DOCTRINE AS APPLIED IN THIS CASE CONTRAVENES THE LABOR MANAGEMENT RELATIONS ACT, AS AMMENDED, BY IMPROPERLY COMPELLING THE EMPLOYER TO BARGAIN WITH A UNION WHERE A GOOD FAITH DOUBT EXISTED AS TO THE UNION'S MAJORITY STATUS.

There is no basis for finding that Fall River unlawfully refused to recognize the Union in violaton of the Act. This is so because Fall River did not reject the Union's request for recognition at a time when the Employer would have been obliged to honor such a request either under successorship principles or under the Act.

The original demand for recognition on October 19, 1982 was undisputedly premature. The Administative Law Judge in his decision stated that the demand for bargaining by the Union claiming to represent a majority of former employees must be made when the new employer is operating at a "representative capacity" (App. p. A-38). However, he went on to hold that if the new employer is not at that capacity at the time of the demand, the demand is of a "continuing nature", and once the employer reaches a representative capacity, the bargaining obligation will attach (App. p. A-38). The NLRB'S construction and the Court of Appeals' affirmance have retroactively transformed the Employer's good faith rejection of the Union's demand into proscribed conduct under Sections 8 (a)(1) and (5) of the Act.

It is not denied by the NLRB that the Union's original demand for recognition and bargaining, which was made on October 19, 1982, and rejected by the Employer on October 21, 1982, was in effect an illegal demand. At that time, there was neither a representative, nor a full complement of workers hired by Fall River. If the Employer had acceded to the premature recognition demand, it would have been a violation of Section 8(a) (2) of the Act since the Employer would be recognizing a nonmajority union. *Hedstrom Company v. NLRB*, 558 F.2d 1137 (CA 3, 1977), *cert. denied*, 450 U.S. 996 (1981). The same is also true

on November 1, when the Union filed its charge, and on December 21, when a complaint was issued by the Regional Director, and even on January 4, 1983, when Fall River answered the complaint.

The Administrative Law Judge found that the duty to bargain with the Union attached for the Employer in mid-January, 1983 at the time the plant was running one shift at full capacity. It should be noted that no new demand was made in January, 1983 or at any time after the initial one.

It is this very same illegal demand in violation of Section 8(a)(2), that the NLRB and Court of Appeals have retroactively condoned by using a continuing demand concept. Judge Torruella noted the irrationality of the continuing demand concept under the facts of this case in his dissent in the court of Appeals. He stated:

> "By what logic or reasoning can events that took place therafter retroactively be made to transform these good faith rejections by Fall River into illegal conduct? At best the Board's ambiguous criteria create an unacceptable uncertainty in the standard of conduct required of successors." (App. p. A-29).

The Administrative Law Judge and the NLRB claim that since the original demand on October 19 was made at such time that the new Employer was not operating at a representative capacity, the demand automatically continues. "Once the employer reaches a representative capacity, the bargaining obligation will attach." (App. p. A-38). However, neither the Administrative Law Judge in his decision, nor the NLRB majority in their decision, cited any authority or gave any explanation or rationale for the principle that a bargaining demand in a successorship situation made by a union at a time when the employer is not operating at a representative capacity is of a continuing nature and continues until such time as the new employer reaches a representative capacity, at which time a bargaining obligation will attach to the new employer.

The uncertainty of such a rule will undoubtedly act to deter employers from investing in the assets of defunct businesses. If an entrepreneur seeks to start a new business using assets purchased on the open market, months earlier, from the "estate" of a failed business, he should not have to worry that at some indefinite time in the future, he can be found to have violated the Act, retroactively. In this respect, the NLRB's continuing demand concept, if applied in conjunction with the representative complement standard, might deter new investments which would provide new jobs for laid off workers.

In *Hedstrom v. NLRB, supra*, the Court of Appeals for the Third Circuit disagreed with the NLRB-promulgated concept of "continuing demand", also in an unfair labor practice context, reasoning that if it were adopted, the employer might be forced to violate Section (8)(a) (2) of the Act by recognizing a minority union. The Court held, at p. 1148:

> "We canot accept any concept of continuing demand which requires an employer either to recognize a minority status union, or to risk a § 8(a) (5) violation in the event the minority union attains majority status sometime after the demand, unless it gives renewed notices to the employer that it has attained majority status since the last demand. If an employer were to recognize and bargain with a union which does not represent a majority of the employees in the appropriate unit, it commits an unfair labor practice in violation of § 8(a) (2) which prohibits an employer from aiding any minority union. International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 48 LRRM 2551 (1961)."

This Court is respectfully urged to correct the NLRB's continuing demand concept which has been misapplied in the successorship context by the NLRB and the Court of Appeals. The Employer did not violate the bargainng obligations set forth in the Act.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Fall River Dyeing & Finishing Corp.

Dated: January 15, 1986

APPENDIX

United States Court of Appeals

for the

First Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FALL RIVER DYEING & FINISHING CORP.
Respondent.

DECREE

Entered: October 18, 1985

This cause came on to be heard on application for enforcement of an order of the National Labor Relations Board, and was argued by Counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The application for enforcement is granted and the order of the National Labor Relations Board is hereby affirmed and enforced.

By the Court,

Francis P. Scigliano
Clerk.

A True Copy
Attest:

Clerk

[Cert. cc: N.L.R.B. and Messrs. Bernstein and Drogin; and cc: Mr. Fuchs, Regional Director]

United States Court of Appeals

for the

First Circuit

No. 85-1019

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FALL RIVER DYEING & FINISHING CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
Bownes, Rubin* and Torruella,
Circuit Judges.

Ira Drogin with whom *Leaf, Sternklar & Drogin* was on brief for respondent.

William M. Bernstein with whom *Elinor Hadley Stillman*, *Rosemary M. Collyer*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Associate General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, were on brief for petitioner.

October 18, 1985

*Of the Fifth Circuit, sitting by designation.

RUBIN, *Circuit Judge*. The National Labor Relations Board found that Fall River Dyeing & Finishing Corporation (the Company) was the successor to Sterlingwale Corporation, most of whose assets the Company acquired when Sterlingware became insolvent and was liquidated. The Board also found that a premature demand for collective bargaining made by the Union that had represented Sterlingwale's employees continued in force and became effective against Fall River upon its employment of a representative complement of Sterlingwale employees. Because Fall River, upon reaching its representative complement of employees, did not recognize and bargain with the Union, the Board found that it had violated Section 8(b) (5) and (1) of the National Labor Relations Act. We enforce the Board's order, finding that substantial evidence on the record as a whole supports the Board's conclusions and the legal principles it applied do not violate the Act.

I.

For more than thirty years before 1982, Sterlingwale, which was owned by the Ansin family, operated a plant at Fall River, Massachusetts, in which it engaged primarily in dyeing and finishing textiles. Sterlingwale bought unfinished fabrics for its own account, dyed and finished them, then offered the fabrics for sale to apparel manufacturers. This business is known in the trade as "converting." Sterlingwale also dyed and finished fabrics owned by other customers to the customers' specifications, a business known as "commission finishing." In 1981, sixty to seventy percent of Sterlingwale's volume was converting and the rest commission finishing.

The process for dyeing and finishing fabrics is the same whether the work is done for resale or on commission. However, the financing and customer relations aspects of the two types of businesses are different. Converting requires capital to buy merchandise and a sales force. Several major national firms are engaged in this business, and it is intensely competitive. Commission finishing serves a different market and involves supplying only the services designated by the customer.

Adverse economic conditions and foreign competition afflicted the textile industry in the 1970's. Sterlingwale's business became unprofitable but Ansin, its president and principal stockholder, tried to stay in business because he thought that he "owed that to the community" and to the company's employees, many of whom had been employed by it for over twenty-five years. Early in 1982, after years of losses amounting to millions of dollars, Sterlingwale ran out of cash and could no longer buy fabric for its converting business. Consequently, Ansin ceased normal production operations and began to liquidate the company, laying off employees and selling its inventory. In July 1982, Sterlingware employed a professional liquidator to sell the firm's remaining assets. Sterlingwale then executed an assignment of its assets for the benefit of its creditors.

Through another company, Arthur Friedman, who is now the President of Fall River, acquired Sterlingwale's equipment and the real property formerly used by it at a mortgage foreclosure sale. Friedman's company conveyed the equipment and leased part of the original Sterlingwale plant to Fall River Dyeing & Finishing.

Fall River, operating out of one of the three former Sterlingwale buildings, began hiring employees on September 20, 1982. The employees then spent approximately four to six weeks on start-up operations, cleaning, relocating and repairing machines. They spent the next four to five weeks on experimental production to ensure that everything was in working order. Following the start-up stage, employees did much the same work they had done for Sterlingwale. The Company conducted all of its operations in what had been Sterlingwale's production building, using the same machinery and the same basic process. It did commission work, as Sterlingwale had done, but did no converter work.

By a letter dated October 19, the union demanded that Fall River recognize it as its employees' collective bargaining agent. The Company replied that it did not intend to comply with the

request. At that time, the Company was still engaged in start-up operations, and, as the Board found, did not have a representative complement of employees.

The Company's initial production goal was to have one full shift operation employing fifty-five to sixty employees. Upon reaching that goal, the Company intended to "see how business would be," and planned to expand to a two-shift operation by April 1983. Such a sixteen-hour operation is desirable, indeed almost essential to the production process because the fabrics emerge from the process wet and the entire operation, including drying, cannot be completed in eight hours.

By November 1982, employees had been hired in virtually all job classifications. In mid-January 1983, the first shift was in full operation and the Company had begun a second shift. At that time, the Company had hired at least fifty percent of those it would ultimately employ in the majority of existing job classifications and 55 of the 106-109 employees it was to employ in April, the month in which the Company reached its anticipated employee complement. Of the fifty-five employees hired by mid-January, approximately thirty-six were former Sterlingwale employees. Eight of the Company's twelve supervisors were former Sterlingwale supervisors and three of the other four were former Sterlingwale employees. Over half of the dollar volume of the Company's business came from former customers of Sterlingwale.

The Board found that, as of January 15, 1983, the Company had employed a representative complement of employees in an appropriate unit and that at that time the Company was a successor employer to Sterlingwale. The Board further found that the Union's bargaining request constituted a continuing demand for recognition and bargaining and that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act[1]

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[1] 29 U.S.C. § 158(a) (5) & (1).

by refusing to recognize and bargain with the Union once its successor bargaining obligation arose.

Member Hunter dissented on the ground that the Company did not have a representative complement of unit employees at the time of the Union's October 19 recognition demand and the Company's October 22 refusal. Absent a renewed Union bargaining demand at a time when the Company had reached a representative complement, Member Hunter would find no bargaining obligation.

II.

"[A] mere change of employers or of ownership in the employing industry," the Supreme Court held in *NLRB v. Burns International Security Services, Inc.*,[2] does not affect the Board's certification of a bargaining unit. The successor employer's obligation to bargain is founded on the mandate of Sections 8(a)(5) and 9(a) of the Act[3] – an employer must bargain with "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes."[4] The successor employer's obligation also arises from the rule that a mere change in ownership does not destroy the presumption of continuing employee support for a certified union.[5] "The basic rationale is that a mere change in ownership, without an essential change in working conditions, would not be likely to change *employee* attitudes toward representation."[6]

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[2] 406 U.S. 272, 279, 92 S.Ct. 1571, 1577, 32 L.Ed.2d 61, _____ (1972).

[3] 29 U.S.C. §§ 158(a)(5) & 159(a).

[4] *Id.* § 159(a).

[5] *See* NLRB v. Burns Int'l Sec. Servs., 406 U.S. at 277-279, 92 S.Ct. at 1577, 32 L.Ed.2d at _____; *see also* Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984) (table).

[6] Premium Foods, Inc. v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983) (emphasis in original); *see* NLRB v. Band-Age, Inc., 534 F.2d 1, 6 (1st Cir. 1976), *cert. denied*, 429 U.S. 921, 97 S.Ct. 318, 50 L.Ed.2d 288 (1976).

If, after a change in ownership, the essential nature of the enterprise remains unchanged, and a majority of the "new" firm's employees or management were employed by the predecessor company, the new employer is considered the old employer's "successor." As such, the new employer must recognize the incumbent union and deal with it as the bargaining representative of the employees.[7]

In determining whether an employer must recognize and bargain with a union that has represented the employees of the former employer, "the Board looks to the totality of the circumstances to determine whether there has been a substantial and material alteration in the employing enterprise."[8] In making this determination, the Board considers various factors, among them the percentage of employees who were employed by the previous employer, the extent to which their former supervisors have been retained, the indentity of skills used and functions performed by the employees, the continuation of the business in the same physical facility with the same or similar equipment, the continuity of products sold or services rendered, and the identity of the customers.[9] Significant changes in the scope of the new employer's business are to be considered, but alone they do not negate the possible successorship status of the new business.[10] The critical inquiry is whether any changes in operation have significantly altered the employees' working conditions, the

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[7] NLRB v. Burns Int'l Sec. Servs., 406 U.S. at 279-81, 92 S.Ct. at 1577-79, 32 L.Ed.2d at ____; NLRB v. Band-Age, Inc., 534 F.2d at 3.

[8] NLRB v. Boston Needham Indus. Cleaning Co., Inc., 526 F.2d 74, 77 (1st Cir. 1975).

[9] *See* NLRB v. Burns Sec. Servs., Inc., 406 U.S. at 279-80 n.4; 92 S.Ct. at 1578 n.4; 32 L.Ed.2d at ____ n.4; NLRB v. Middleboro Fire Apparatus, Inc., 590 F.2d 4, 7-8 (1st Cir. 1978); NLRB v. Band-Age, Inc., 534 F.2d at 3-4, 6 (1st Cir. 1976).

[10] NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 463, 465-66 (9th Cir. 1985); NLRB v. Hudson River Aggregates, Inc. 639 F.2d 865, 869 (2d Cir. 1981).

employment relationship, and correspondingly, the employees' expectations and needs with regard to representation.[11]

The seven-month hiatus between the cessation of production at Sterlingwale and the commencement of the Company's operations is to be considered, but it is similarly not dispositive.[12] A hiatus does not of itself preclude a successorship finding because the inquiry focuses on employee expectations of rehire in the light of indications during this interim of plans to resume plant operations under new management. The interim period may be viewed as part of "the normal concomitants of a new management and a new approach to a failing business, not a break in the continuity of the employing industry."[13]

Because the enterprise-continuity determination is based on the totality of circumstances, decisions turn "to a great extent on the precise facts involved."[14] A reviewing court's inquiry is limited to whether the Board's findings are supported by substantial evidence, viewing the record as a whole.[15]

The Board's finding in this case that the Company was substantially continuous to Sterlingwale is supported by substantial evidence in the record, considered as a whole, as the evidence

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[11] *See* NLRB v. Band-Age, Inc., 534 F.2d at 6; NLRB v. Boston Needham Indus. Cleaning Co., Inc., 526 F.2d at 77; NLRB v. Jeffries Lithograph Co., 752 F.2d at 464.

[12] NLRB v. Band-Age, Inc., 534 F.2d at 5.

[13] NLRB v. Middleboro Fire Apparatus, 590 F.2d at 8.

[14] Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 256, 94 S.Ct. 2236, 2240, 41 L.Ed.2d 46, ____ (1974) (quoting NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 274, 92 S.Ct. 1571, 1575, 32 L.Ed.2d 61, ____ (1972)). *See also* International Union of Elec., Radio & Mach. Workers v. NLRB, 604 F.2d 689, 694 (D.C. Cir. 1979).

[15] Universal Camera Corp. v. NLRB, 340 U.S. 474, 490, 71 S.Ct. 456, 466, 95 L.Ed. 456, ____ (1951); NLRB v. Middleboro Fire Apparatus, Inc., 590 F.2d at 6; NLRB v. Boston Needham Indus. Cleaning Co., Inc., 526 F.2d at 76.

summarized above demonstrates. The Company did not assume Sterlingwale's liabilities or acquire its trade name but these facts do not preclude a finding of successorship.[16] Although the Company operated exclusively as a commission dyer and finisher and did not continue the converter work performed by Sterlingwale, this change did not alter the essential nature of the employees' responsibilities because both types of work involve essentially the same production process. The differences between the Company's business and Sterlingwale's are not sufficiently significant to require a finding that the continuity of the enterprise, viewed from the employees' standpoint, was broken. The changes in purchasing, sales, marketing, and financial operations brought about by the switch to a straight commission operation are only indirectly related to the interests of the unit production and maintenance employees.[17] The change from three shifts to two and the reduction in the number of supervisors might rationally be found to represent only a reduction in the size and scope of the operation, not an essential change in the employing enterprise.

III.

In a successorship situation, the bargaining obligation can normally be determined at the time of transfer or when operations begin.[18] In other instances, however, such as when an employer is rebuilding a collapsed business or is operating at a substantially reduced capacity, a delay in making the determination may be appropriate. As the Supreme Court has noted, a determination regarding the successor's obligation to bargain may have to wait "until the successor employer has hired his full complement of employees ..., since it will not be evident until then that the

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[16] *Cf.* NLRB v. Band-Age Inc., 534 F.2d at 5; Tom-a-hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1026-1027 (7th Cir. 1969).

[17] *See* NLRB v. Interstate 65 Corp., 453 F.2d 269, 273 (6th Cir. 1971).

[18] NLRB v. Hudson River Aggregates, Inc. 639 F.2d 865, 870 (2d Cir. 1981); *see also* NLRB v. Ideal Laundry Corp., 422 F.2d 801, 804 (10th Cir. 1970).

bargaining representative represents a majority of employees in the unit as required by § 9(a) of the Act."[19]

This "full complement" principle, however, has not been interpreted to require that the examination of the workforce composition be postponed until the business is operating at its maximum capacity or until the employer has completed hiring all of its bargaining unit employees. Courts have agreed that, in cases in which the successorship obligation cannot be determined at the very outset of the transition, fixing the appropriate date at which the bargaining obligation arises "involves balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible."[20]

These interests are effectively reconciled in the "substantial and representative complement" standard applied by the Board in this case.[21] This "standard embodies the balance between early representation and maximum participation that lies at the heart of the 'full complement' concept,"[22] and it has met with general acceptance in courts that have considered this type of successorship problem.[23]

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[19] NLRB v. Burns Sec. Servs., Inc., 406 U.S. at 295, 92 S.Ct. at 1586, 32 L.Ed.2d at ____.

[20] NLRB v. Pre-Engineered Bldg. Prods., Inc., 603 F.2d 134, 136 (10th Cir. 1979); *accord* Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983); NLRB v. Hudson River Aggregates, Inc., 639 F.2d at 870-71.

[21] *See, e.g.*, Indianapolis Mack Sales and Serv., Inc., 272 N.L.R.B. No. 108, 117 L.R.R.M. 1335 (1984); *enforcement appeal filed*, No. 84-3061 (7th Cir. Dec. 7, 1984); Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984) (table).

[22] Premium Foods, Inc. v. NLRB, 709 F.2d at 628.

[23] NLRB v. Jeffries Lithograph Co., 752 F.2d at 467; NLRB v. Hudson River Aggregates, Inc., 639 F.2d at 870; *see also* NLRB v. Pre-Engineered Bldg. Prod., Inc., 603 F.2d at 136 & n.1 (10th Cir. 1979).

The Company's contention that the Board's representative complement standard is "at variance with the Ninth and Tenth Circuits" is not supported by the cases cited. In *Pacific Hide & Fur Depot, Inc. v. NLRB*,[24] the Ninth Circuit declined to enforce the Board's order to bargain in part because it read the Board's decision in that case as rejecting altogether the proposition that the *Burns* "full complement" dictum was relevant to the question whether a successorship obligation exists. While the court implied in dicta that strict adherence to the "full complement" standard was proper, it also recognized that a "full complement" could be defined "only by considering the facts of each case" in the light of the general goals to be attained.[25] The Ninth Circuit has since made clear its acceptance of the "substantial and representative complement" standard as an appropriate means of satisfying the interests recognized in *Burns*.[26] Similarly, in *NLRB v. Pre-Engineered Building Products*,[27] the Tenth Circuit, while it declined to enforce the Board's order on the basis of the record evidence, rejected a rigid interpretation of the "full complement" standard that would postpone the obligation to bargain until the employer achieved its ultimate objectives and acknowledged the necessity of balancing the objecives of early representation and maximum employee participation.[28]

In determining whether a representative complement existed at a given date, the Board first looks to see whether the job classifications for the operation were "filled or substantially filled" and whether the operation was in "normal or substantially

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[24] 553 F.2d 609 (9th Cir. 1977).

[25] *Id.* at 613.

[26] *See* NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 467 (9th Cir. 1985) (citing Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628-29 (9th Cir. 1985)).

[27] 603 F.2d 134 (10th Cir. 1979).

[28] *Id.* at 136.

normal production."[29] The Board also considers the size of the complement on that date, the time expected to elapse before a substantially larger complement would be hired, and the relative certainty of the expected expansion.[30]

Considering these guides, the Board reasonably found that the Company employed a substantial and representative complement of its workforce in mid-January. By then the Company had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement. No workers having new skills were later employed. The Company had also reached substantially normal production in mid-January, at which time the first shaft was in full operation and a second had begun.

IV.

In successorship situations, when a union's clear request for bargaining in an appropriate unit has been rejected outright and unconditionally by the employer, the Board has treated the demand as continuing and has not required the union to renew the demand later, even if the employer's bargaining obligation was not mature at the time of the original request.[31] The Board has applied this doctrine in cases in which a union, lacking a majority at the time of its original demand, did not renew the

[29] Premium Foods, Inc. v. NLRB, 709 F.2d at 628; *accord* NLRB v. Jeffries Lithograph Co., 752 F.2d at 467 (9th Cir. 1985); Indianapolis Mack Sales and Serv., Inc., 272 N.L.R.B. No. 108, 117 LRRM 1335 (1984), *enforcement appeal filed*, No. 84-3061 (7th Cir. Dec. 7, 1984); *see also* Hayes Coal Co., Inc., 197 N.L.R.B. 1162, 1163 (1972).

[30] NLRB v. Jeffries Lithograph Co., 752 F.2d at 467-68; Premium Foods, Inc. v. NLRB, 709 F.2d at 628.

[31] Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 n.9 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984) (table).

demand upon gaining a majority[32] and in cases in which an employer, seeking to defend against an unfair labor practice charge, asserts the charge is barred by the Act's statute of limitations[33] because of the union's failure to renew its demand within six months of the charge's filing.[34]

The Company argues, however, that the Third Circuit's rejection of the continuing demand concept in *Hedstrom Co. v. NLRB*[35] controls the present case. In *Hedstrom*, a case not involving a successor enterprise, the initial demand was made by a union lacking majority support. The court reasoned that to recognize as continuing a demand made when the union lacked majority designation would force employers "to tread the fine line between"[36] violating Section 8(a)(2) of the Act,[37] which prohibits recognizing a minority union, and violating Section 8(a)(5) of the Act,[38] which requests employers to bargain with the majority union. Under the circumstances present in *Hedstrom*, if the initial immature demand were to be deemed continuing, the employer's obligation to bargain would arise simply upon the union's reaching majority status. Such a rule would require an employer to monitor the union's status in order to avoid violating Section 8(a)(5) of the Act.

The rationale of *Hedstrom* is nullified in successorship cases. When a continuity in the enterprise has been found, as is the

[32] Schwab Foods, Inc., 223 NLRB 394, 413 (1976), *enforced* 549 F.2d 805 (7th Cir. 1977) (table); Local No. 152 v. NLRB, 343 F.2d 307, 310 (D.C. Cir. 1965).

[33] National Labor Relations Act § 10(b); 29 U.S.C. § 160(b).

[34] Enterprise Prods. Co., 265 NLRB 544, 563 (1982).

[35] 558 F.2d 1137, 1146-48 (1977), *cert. denied*, 450 U.S. 996, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981).

[36] *Id.* at 1148.

[37] 29 U.S.C. § 158(a)(2).

[38] *Id.* § 158(a)(5).

case here, "the presumption of majority status by the union under the predecessor . . . is not affected by a change in ownership."[39] "A union is not required to substantiate anew its majority status when a successor assumes an employer's business."[40] The rationale behind this presumption of majority status derives from the fact that a successor's obligation to bargain with the union arises when the employer reaches a "substantial and representative complement" of its work force.[41] The employer, unlike the union, can readily reach this determination on its own by examining whether the job classifications for the operation have been "filled or substantially filled" and whether the operation is in "normal or substantially normal production."[42] Thus, in the successorship context, the continuing demand concept does not present the risks the *Hedstrom* court found unfair.

In the successorship context, moreover, the Board's continuing demand rule is practical. Unions often lack precise information about when a change in ownership of a firm is to take place, how it is to take place, and what plans, if any, the new owners have for expansion or modification of the enterprise; it is thus not uncommon for bargaining demands to be made before the bargaining obligation actually arises.[43] In none of the successorship cases was it even claimed that the Board could not properly find a Section 8(a) (5) violation because the initial bargaining

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[39] Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984) (table).

[40] *Id.* at 1346.

[41] *See supra* text accompany notes 19-30.

[42] Premium Foods, Inc. v. NLRB, 709 F.2d at 628; *see also* Hayes Coal Co., Inc., 197 N.L.R.B. 1162, 1163 (1972).

[43] *See, e.g.*, NLRB v. Hudson River Aggregates, 639 F.2d at 867-68, 870 (2d Cir. 1981); Aircraft Magnesium, 265 N.L.R.B. 1344, 1344-45, 1346 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984); *Cf.* Premium Foods, Inc. v. NLRB, 709 F.2d at 625-26, 629 (though union demand timely, sent to wrong company also involved in the transfer).

demand was not renewed, and the Company has cited no successorship case that supports that proposition.

The doctrine applied by the Board may not be one that we would ourselves devise. Given the discretion imparted to it to interpret and enforce the Act, we do not find the Board's ruling "arbitrary or contrary to law."[44]

V

At the unfair labor practice hearing, the Company sought to introduce two petitions disclaiming employee support for the Union. The petitions had been signed by the employees on April 29, 1983, three days before the unfair labor practice hearing commenced. The administrative law judge rejected these exhibits because, given their timing, they could not justify the Company's refusal to bargain on January 15. The administrative law judge properly declined to consider the petitions on the ground that they were made after the time when the Company became obligated to bargain with the Union and failed to do so. As in the analogous situation of an employer withdrawing recognition from a union because it is in good faith doubts the union's majority status, no useful purpose is served by permitting the employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal.[45] Furthermore, once it has been determined that an employer has unlawfully withheld recognition of an employees' bargaining representative, the employer cannot defend against a remedial bargaining by pointing to an intervening loss of

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[44] Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 413, 102 S.Ct. 720, 725, 70 L.Ed.2d 656, ____ (1982); *see also* Beth Israel Hosp. v. NLRB 437 U.S. 483, 501, 98 S.Ct. 2463, 2473-74, 57 L.Ed.2d 370, ____ (1978) (The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.").

[45] *See* Terrell Machine Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929, 90 S.Ct. 1821, ____ L.Ed.2d ____ (1970); NLRB v. Gulfmont Hotel Co., 362 F.2d 588, 589 (5th Cir. 1966).

employee support for the union when such loss of support is a foreseeable consequence of the employer's unfair labor practice.[46]

Had the Company voluntarily bargained with the Union in January, the employees' wage concerns might have been addressed and the employees might not have signed these petitions. If the employees had nonetheless signed petitions disclaiming support for the Union after such bargaining, the Company might have had a basis for withdrawing recognition; having behaved lawfully, it would be free to withdraw recognition on the basis of any evidence that established actual loss of majority or supported good faith doubt.[47] However, the Board found the Company did not bargain when it should have; hence, these petitions cannot properly serve either to justify the earlier refusal to bargain or to affect the order remedying that refusal.[48]

For these reasons, the Board's Order is ENFORCED.

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[46] Franks Bros. Co. v. NLRB, 321 U.S. 702, 702-04, 64 S.Ct. 817, 818, 88 L.Ed. 1020, ____ (1944).

[47] Landmark Int'l Trucks, Inc. v. NLRB, 699 F.2d 815, 819 (6th Cir. 1983); Harley-Davidson Transp. Co., 273 N.L.R.B. No. 192, 118 L.R.R.M. 1204 (Jan. 22, 1985).

[48] Aircraft Magnesium, 265 N.L.R.B. 1344, 1346 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984).

TORRUELLA, *Circuit Judge* (Dissenting). The central issue presented by this appeal is whether the National Labor Relations Board (Board) has contravened *N.L.R.B. v. Burns International Detective Agency*, 406 U.S. 272 (1972) in ruling that Fall River is a "successor employer" to Sterlingwale and was thus bound to recognize and negotiate with the labor organization that represented Sterlingwale's employees. Underlying the resolution of this question are two Board-promulgated theories: (1) the "continuing demand" concept, whereby a union's demand for recognition, once made and rejected by an employer, is considered to be continuing in nature, *see Aircraft Magnesium*, 265 N.L.R.B. 1344, 1345 n.9 (1982), enforced, 730 F.2d 767 (9th Cir. 1984), and (2) the "substantial and representative complement" standard, under which the determination of whether a new employer is a successor is postponed until his workforce reaches a substantial complement, representative of the number and type of employees that will ultimately constitute the appropriate bargaining unit. *Aircraft Magnesium*, 265 N.L.R.B. at 1345; *Premium Foods, Inc. v. N.L.R.B.*, 709 F.2d 623, 628 (9th Cir. 1983). These issues are unavoidably intertwined and are of first impression in this circuit.

At the outset, it must be recognized that "[t]he judicial role is narrow: The rule[s] which the Board adopts [are] judicially reviewable for consistency with the Act, and for rationality, but if [they] satisfy[y] those criteria, the Board's application of the rule[s], if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 501 (1977). *See also* § 10(e), N.L.R.A., 29 U.S.C. § 160(e); Administrative Procedure Act, 5 U.S.C. § 706(2)(E); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951). In my opinion the Board has failed to meet all of these tests and is promoting concepts that are clearly contrary to the Labor Management Relations Act (Act) and to Supreme Court precedent.

In the area of successorship there are few broad governing principles and thus, there exists considerable uncertainty. *N.L.R.B. v. Band-Age, Inc.*, 534 F.2d 1, 2 (1st Cir. 1976). *See also* Note, *The Bargaining Obligations of Successor Employers*, 88 Harv. L. Rev. 759, 760 (1975) (hereinafter cited as *Bargaining Obligations*); Comments, *Criteria For Determining Employer*

Successorship-Factor Analysis, Burns and the Need For a New Standard, 11 Wake Forest L. Rev. 437, 446, 457 (1975) (hereinafter cited as *Criteria*). In light of the difficulty of the successorship question, it is especially appropriate to focus on the particular facts of each case. *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees Union*, 417 U.S. 249, 256 (1974); *Band-Age, Inc., supra.*

In the present case, the facts upon which the Board's action is predicated are essentially undisputed. I will restate them, however, in the context of various items apparently glossed over by the Board in reaching its successorship conclusion.

On February 12, 1982, Sterlingwale shut down its textile dyeing and finishing operation and indefinitely laid off all of its production and maintenance employees. These employees were represented since 1968 by the United Textile Workers of America, AFL-CIO, Local 292 (Union). A series of collective bargaining agreements had been negotiated, the last of which was due to expire on April 1, 1982, and eventually did so expire without further extension by the parties. Notwithstanding the existence of a grievance and arbitration procedure, the Union did not challenge Sterlingwale's actions, as it was patently clear that the terminations were not motivated by anything except Sterlingwale's dire economic circumstances involving the loss of millions of dollars.

After February 12th, Sterlingwale entered a period of liquidation during which it retained a skeleton crew until the Summer of 1982, when the business ceased activities altogether. An assignment was made for the benefit of creditors and a foreclosure was made on the premises occupied by Sterlingwale. Thereafter, Sterlingwale's property was sold at auction. The real property was acquired in late August 1982 by Macramy Sales Corp. (Macramy), who then leased part of these premises to Fall River. Fall River moved into this locale in September 1982. Fall River also acquired at auction most of Sterlingwale's machinery, furniture, and fixtures, and part of Sterlingwale's remaining materials and inventory. It is significant to note that these purchases were made *at public auction*, not through direct private sales.

Fall River acquired no other former Sterlingwale assets such as its trade name, good will, or customer lists, nor did Fall River assume any of Sterlingwale's liabilities. Additionally, there is no evidence that Fall River obtained any of Sterlingwale's employee lists or personnel records.

Thereafter, Fall River publicly advertised employment opportunities in the local newspapers. On September 20, 1982, after hiring its first new employees, it commenced preliminary start-up operations in one of three former Sterlingwale buildings. Fall River proposed to engage solely in commission work, which consists of the dyeing and finishing of fabric belonging to others for a commission, in contrast with Sterlingwale, whose business had been approximately 60-70% processing its own fabric and only 30-40% commission finishing.

On *October 19, 1982*, the Union sent Fall River a letter stating that, "pursuant to the Agreement between Sterlingwale" and the Union, the Union demanded recognition. It then indicated that on October 28th at 1:00 PM a Union representative would call upon Fall River "for the purpose of negotiating a collective bargaining agreement." At the time of this demand Fall River had 21 employees on the payroll, 18 of whom were former Sterlingwale employees. Fall River's initial production goal was to have a one-shift operation of 55 to 60 employees, and then to expand fully to a two-shift operation totaling 106-109 employees by April 1983.

On October 21, 1982, in a letter written by its counsel, Fall River indicated that it did "not intend to comply with [the Union's] request; and further . . . that there was no legal basis for same."

On *November 1, 1982*, the Union filed an unfair labor practice charge with the Board, claiming that Fall River had violated Sections 8(a) (1) and (5) of the Act. By mid-November, Fall River had hired employees in virtually all job classifications. They were engaged in start-up operations, cleaning and repairing machines for the first 4-6 weeks, and carrying out experimental production on old Sterlingwale inventory during the next 4-5 weeks.

After investigation, the Regional Director of the Board on *December 21, 1982* issued a complaint charging Fall River with violation of Sections 8(a) (1) and (5) of the Act because "[o]n or about October 21, 1982, and at all times thereafter, Respondent did refuse and continues to refuse to meet and bargain collectively, with the Union as the exclusive representative of all the employees in the unit." A hearing was set for May 2, 1983.

On *January 4, 1983*, Fall River answered the complaint, the substance of which was a denial that it was a successor employer to Sterlingwale or that it had violated Sections 8(a) (1) and (5) of the Act.

In mid-January, 1983, the first shift was in full operation and a second shift was begun, with a total complement of 55 employees, approximately 36 of whom were former Sterlingwale employees. Furthermore, Fall River's Vice-President and Secretary, Herbert Chance, had formerly served as Vice-President of Sterlingwale until February, 1982. Over half of the dollar volume of Fall River's commission dyeing and finishing work came from customers who had also done business with Sterlingwale.

Fall River continued to expand until it reached its goal of a full complement of employees in *mid-April 1983*, with two 10-hour shifts employing approximately 106 to 109 persons. By March 24, 1983, former Sterlingwale employees were a minority of the employees in the production and maintenance unit.

The hearing before the administrative law judge began on May 2nd. The judge held in substance that the Union's October 19th demand was a continuing one that Fall River was bound to comply with at such time as its operations reached a "representative complement, not full complement." He then ruled "that the duty to bargain with the Union attached for [Fall River] in mid-January 1983," and ordered Fall River, *upon request of the Union*, to bargain.

A majority of the Board, with one dissenting vote, adopted the decision *in toto*, enforcement of which is now before us.

There are three distinct but related reasons why enforcement should be denied.

I

The Board's "representative complement" rule contravenes the "full complement" rule enunciated by the Supreme Court in *N.L.R.B. v. Burns International Detective Agency, supra. See Criteria*, 11 Wake Forest L. Rev. at 449, 457. In *Burns* the Court was faced with a changeover of employers in an ongoing operation. Wackenhut Corporation, the initial employer, had a contract to provide security services to the Lockheed Aircraft Company. A majority of Wackenhut's employees voted in a Board-supervised election to be represented by a union and, thereafter, Wackenhut and the union negotiated a collective bargaining agreement. Approximately four months later Wackenhut's contract with Lockheed expired without renovation. Instead, Lockheed contracted with the Burns Detective Agency for these services. At the time of Burns' takeover, Burns employed 27 of Wackenhut's guards directly from the certified unit, in addition to which it completed the unit by bringing in 15 of its own guards from other Burns' locations. No hiatus occurred in the provision of services to Lockheed between the Wackenhut and Burns' operations. After the takeover Burns refused the union's request for recognition and compliance with the labor contract and the Board thereafter found Burns in violation of Sections 8(a) (1) and (5) of the Act as a successor of Wackenhut.

In sustaining the Board's findings regarding successorship, the Court stated:

> In an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in the identical unit. It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract. In these circumstances, it was not unreasonable for the

> Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact, Burns' obligation to bargain with the union over. terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer.

406 U.S. at 278-279.

The Court then considered the Board's findings that Burns had violated the Act by unilaterally changing working conditions of the employer. The Court, in ruling against the Board stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. *In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act*, 29 U.S.C. § 159 (a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that Burns refused to bargain on July 12 when it rejected the overtures of the union.

406 U.S. at 294-95 (emphasis supplied).

The present case is precisely one of the "other situations" referred to by the court in *Burns*, particularly when we consider the substantial difference between Burns and Fall River that militate in favor of Fall River: the lack of any expression of union preference by the employees for many years (Fall River) versus a recent election and certification (Burns), the non-existence of a labor contract (Fall River) in contrast to one in effect (Burns), the start up of a new business entity after a substantial hiatus following the liquidation of the original employer (Fall River) versus a continuity of operations (Burns).

The court's reference to Section 9(a) of the Act in its ruling is of special relevance as it is this part of the Act that provides for selection of the employee's representatives "for the purpose of collective bargaining by the majority of the employees."[1] This provision establishes a strong public policy favoring free choice of a bargaining agent *by the employees* which should not lightly be frustrated. *Schmerler Ford, Inc. v. N.L.R.B.*, 424 F.2d 1335, 1339 (7th Cir. 1970). It is because of this self-evident principle that four justices dissented in *Burns* against *any* application of the successorship principle to even the strong factual situation in *Burns*, concluding "that the Board and the Court of Appeals stretched that concept beyond the limits of its proper application". 406 U.S. at 296. As the dissent indicates, "the successorship doctrine, carried to its ultimate limits, runs counter to other equally well-established principles of labor law. Industrial peace is an important goal of the Labor Management Relations Act." *Id.* at 302. "But Congress has plainly been unwilling to purchase industrial peace at the price of substantial curtailment of free collective bargaining by the freely chosen representatives of the employees with their employer." *Id.* at 303.

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[1] 29 U.S.C. 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:...

The dissent, in concluding that the application of the successorship doctrine was not authorized by the Act, stated:

> The rigid imposition of a prior-existing labor relations environment on a new employer whose only connection with the old employer is the hiring of some of the latter's employees and the performance of some of the work which was previously performed by the latter, might well tend to produce industrial peace of a sort. But industrial peace in such a case would be produced at a sacrifice of the determination by the Board of the appropriateness of bargaining agents and of *the wishes of the majority of the employees which the Act was designed to preserve*. These latter principles caution us against extending successorship, under the banner of industrial peace, step by step to a point where the only connection between the two employing entities is a naked transfer of employees.

Id., at 306-307 (emphasis supplied). *See also Bargaining Obligations*, 88 Harv. L. Rev. at 763; *Criteria*, 11 Wake Forest L. Rev. at 457.

Although normally a dissent may be considered weak support upon which to base an opinion, the dissent in *Burns* buttresses the soundness of the majority's "full complement" requirement and its reliance on Section 9(a) of the Act for that proposition. Although the majority in *Burns* was not willing to set aside the successorship finding, it did so because it concluded that Burns' employees, *already operating at full complement, and shortly after having freely expressed their collective bargaining preference*, were not being denied their rights under the Act. By requiring a full complement of employees, *all employees* to be affected by the Board's actions were given a choice. The Board's contention that the "full complement" requirement in *Burns* constitutes mere dicta which it is cavalierly free to disregard, is hardly an approach that this court should be eager to follow. *See Pacific Hide & Fur Depot, Inc. v. N.L.R.B.*, 553 F.2d 609 (9th Cir. 1977); *N.L.R.B. v. Pre-Engineering Building Products*, 603 F.2d 134 (10th Cir. 1979).

In the present case the Board's bureaucratic legalese deprives the *employees* of their right to express a free choice, a result totally contrary to the most fundamental purposes of the Act. It is, therefore, not entitled to enforcement. *Beth Israel Hospital*, *supra*.

II

In the seminal case of *Universal Camera v. N.L.R.B.*, *supra*, the Court laid down the rule for review of Board actions by courts of appeal:

> Congress has ... made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

340 U.S. at 488. "The substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Id.* The cumulative impact of multiplication of minutiae cannot be regarded as substantial evidence to support a finding by the Board. *N.L.R.B. v. United Parcel Service, Inc.*, 317 F.2d 912, 914 (1st Cir. 1963). "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Coppus Engineering Corp. v. N.L.R.B.*, 240 F.2d 564, 570 (1st Cir. 1957); *N.L.R.B. v. Local 776, IATSE (Filia Editors)*, 303 F.2d 513, 517 n.3 (9th Cir. 1962), *cert. denied*, 371 U.S. 826 (1963). Such evidence, however, is not substantial if it appears in isolation rather than is viewed in proper perspective. *Id.* Substantiality of evidence is measured by consideration of all the evidence and not merely that which supports the Board's conclusions. *M.R.&R. Trucking Co. v. N.L.R.B.*, 434 F.2d 689 (5th Cir. 1970).

Accepting, as we must, this framework for review, I do not hesitate to find that the Board's conclusion that Fall River is a "successor employer" is not supported by substantial evidence. *See* Note, *The Successor Employer's Obligation to Bargain: Current Problems In The Presumption of a Union's Majority Status*,

8 Fordham Urb. L.J. 429, 442-444 (1980) (hereinafter cited as *Current Problems*).

The traditional test for determining successorship is whether there is *substantial continuity* between the employing enterprises. *Burns*, 406 U.S. at 279-281. In making this determination we look to whether there has been a change in the essential nature of the enterprises. *Burns, id.; Band-Age, Inc., supra*, 534 F.2d at 3; *N.L.R.B. v. Middleboro Fire Apparatus*, 590 F.2d 4, 6 (1st Cir. 1978). This question, as we have previously indicated, is highly fact specific. *Howard Johnson, supra.*

There is no question in my mind but that there has been *no continuity* between the operations of Sterlingwale and Fall River. It is undisputed that Sterlingwale ceased operations and went out of business for economic reasons. It is also undisputed that Fall River is a separate legal entity to Sterlingwale, with different ownership, financing, etc., *e.g.* the Board does not make any claim that Fall River is an *alter ego* of Sterlingwale. Fall River leases one of Sterlingwale's three buildings from a company, totally unrelated to Sterlingwale, who purchased it on the open market. Although Fall River uses machinery and equipment which at one time belonged to Sterlingwale, they also were purchased on the open market. Thus the fact that the building and machinery were once Sterlingwale's property should be totally irrelevant to the successorship determination. Fall River acquired no trade name, good will or other assets from Sterlingwale. It assumed none of Sterlingwale's liabilities. There was no transfer of employee or personnel records between Sterlingwale and Fall River and more importantly, no transfer of any employees or personnel. Those persons hired by Fall River who were former employees, supervisors, or executives of Sterlingwale were also hired from the open market after advertisement. Such new employment took place after *at least* a seven-month period had passed since their termination by Sterlingwale. The nature of Fall River's business is different from that of Sterlingwale's, commission work versus processing, thus bring about substantial changes in Fall River's operation when compared to Sterlingwale: a smaller manufacturing

plant, less employees, less work shifts, longer working hours.[2] There was no transfer of customer lists or customers between Sterlingwale and Fall River, thus any former Sterlingwale customers who also became Fall River customers were presumably acquired in the open market. Last but not least, if the proper *Burns* standard is used, when Fall River reached full capacity, a majority of its employees were "new" employees. *See Current Problems*, 8 Fordham Urb. L.J. at 447.

This record, rather than substantially supporting the Board's conclusion of successorship, should mandate a ruling against it. The situation was stated in more appropriate language by Chief Judge Campbell in his dissent in *Band-Age*:

> The premise of the National Labor Relations Act is industrial democracy, requiring an employer to bargain with the representative of a majority of its employees. This democratic principle must, of course, yield to practicality and the need for industrial peace, as rules limiting the frequency of elections illustrate. But such rules, presuming the continuity of majority sentiment, evolved within the frame of a single enterprise. While they may be appropriately extended to genuine successor entities, they should not apply where the original bargaining unit and nature of the enterprise have been radically altered. I fear that the enlargement of the successorship doctrine to accommodate such a case may sweep aside the requirement that the Union have roots in the actual wishes of the employees. Here it would be simple to require an expression of the wishes of the 37 current employees rather than to presume, somewhat woodenly, that the earlier-expressed wishes of a different group of employees working for a different employer remain effective.

534 F.2d at 7 (citations omitted).

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[2] There are no findings regarding similarity of wages and fringe benefits, factors which would have been relevant to demonstrate continuity.

III

This Court in *Middleboro Fire Apparatus*, a case involving the successorship doctrine held:

> Simply stated, if the Board finds on the totality of the circumstances that a change in ownership did not affect the "essential nature" of the former business, then the new enterprise must recognize and bargain with the union that represented the employees of the former business. *The exception to this rule relevant here permits the new employer not to bargain with the union if the employer could "reasonably have entertained a good-faith doubt" about the union's continued majority status.*

590 F.2d at 6. (Emphasis supplied. Citations and footnotes omitted).

The facts of this case as evidenced by both the Board majority and dissent leave no question as to Fall River's good faith doubt[3] in denying union recognition. *See Current Problems*, 8 Fordham Urb. L.J. at 431, 448.

On October 19, 1982, when recognition and bargaining was requested, the Board concluded that the union was not legally entitled to compliance with this request. As a matter of law, Fall River would have violated Section 8(a)(2) of the Act if it had acceded. 29 U.S.C. 158(a)(2), *see Hedstrom Co. v. N.L.R.B.*, 558 F.2d 1137, 1146-48 (3d Cir. 1977), *cert. denied*, 450 U.S. 996 (1981). The Board also conceded that Fall River was correct on October 21, when it formally denied the Union's request. If we continue this line of reasoning, when the Union filed its charge on November 1, even if Fall River had accepted these allegations, the Board would also have been legally bound to rule, as it did

[3] "In its simplest form, the phrase implies breach of faith, wilful failure to respond to plain, well-understood statutory or contractual obligations." *N.L.R.B. v. Knoxville Pub. Co.*, 124 F.2d 875, 883 (6th Cir. 1942); *Hurry v. Jones*, 560 F. Supp. 500, 507 (D.R.I. 1983).

in its decision, that the Union did not at that point represent Fall River's employees. This hypothesis is equally applicable to December 21, when the Regional Director issued a complaint, and even as late as January 4, 1983 when Fall River answered the same. By what logic or reasoning can events that took place thereafter retroactively be made to transform these good faith rejections by Fall River into illegal conduct? At best the Board's ambiguous criteria create an unacceptable uncertainty in the standard of conduct required of "successors." *See Current Problems*, 8 Fordham Urb. L.J. at 447-449; *Bargaining Obligations*, 88 Harv. L. Rev. at 760, 764; *Criteria*, 11 Wake Forest L. Rev. at 446, 457. This court should not place upon it the imprimatur of legality by enforcing the Board's order.

The issue presented is in reality two-pronged: (1) do these circumstances objectively justify a good faith doubt by Fall River in mid-January, 1983, and (2) is it permissible (*e.g.*, rational) to allow the Board to presume continued Union majority support under the facts of this case in view of the requirements of Section 9 of the Act?

I believe the proper answer to both questions to be in the negative.

If the Board found Fall River to be free from any illegal conduct when the demand was made on October 19, when rejected on October 21, when the complaint issued on December 21st, and when it was answered on January 4, it cannot follow that by the mere "running [of] one shift at full capacity" in mid-January 1983, this fact triggered a duty to bargain with the Union. An objective view of this situation, particularly considering the dynamic circumstances under which they developed, cannot justify the hanging of a bad faith label on Fall River. The factual basis for the presumption of continued majority support for the Union is lacking.

Stated differently, given the facts of this case, there is no rational basis for having an illegal demand (*e.g.*, one which if complied with by Fall River would have subjected it to violation of Section 8(a)(2) of the Act) carryover *ad infinitum*, thus

permitting the imposition of a union on employees who have not expressed a free choice since 1968. Such a rule is clearly contrary to the purposes of the Act as stated in Section 9.

It is ironic, to say the least, that the Board order enforced today requires Fall River to bargain with the Union *upon request*. Yet this minimal effort is dispensed with in deciding the merits of this case.

This Court should not be eager to embrace doctrines fraught with perceptions that run contrary to the spirit and letter of the Act, and which radically depart from logic and common sense.

For the above-stated reasons, I dissent.

ZHDe

272 NLRB No. 127

D--2276
Fall River, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FALL RIVER DYEING &
FINISHING CORP.

and

Case 1-CA-20391

UNITED TEXTILE WORKERS
OF AMERICA, AFL--CIO,
LOCAL 292

DECISION AND ORDER

On 27 January 1984 Administrative Law Judge Burton S. Kolko issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

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[1] In its exceptions, the Respondent challenges, inter alia, the judge's reliance on certain testimony. We interpret this as a challenge to the judge's implicit credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance

(Footnote continued)

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fall River Dyeing & Finishing Corp., Fall River, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 19 October 1984

Don A. Zimmerman, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951).

We also agree with the judge that the Respondent incurred a bargaining obligation in mid-January 1983. It was at that point that the Respondent first employed a substantial and representative complement of its work force (a majority of which, it is undisputed, the Union represented when those employees worked for the Respondent's organized predecessor). Thus, in mid-January the Respondent had one shift in full operation and had started a second shift. All job titles had been filled since the previous November, and by mid-January the Respondent employed more than 50 percent of those it would ultimately employ in the vast majority of existing job classifications. Indeed, at the critical time, the Respondent employed nearly two-thirds the number it planned to ultimately have. Furthermore, with the addition of the second shift, the Respondent added no new skills to its work force.

MEMBER HUNTER, dissenting

Contrary to my colleagues, I would dismiss the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union, Textile Workers Local 292. As of the date that the Union made its recognition demand on 19 October 1982 the Respondent did not have even a representative complement of employees and did not have such complement until 15 January 1983, the date on which the judge and my colleagues have imposed a bargaining obligation. Thus, at the time the Respondent denied recognition on 21 October 1982, it had no obligation to recognize the Union. In the absence of any evidence that the Union renewed its request for recognition subsequent to October 1982 at a time when the Respondent would have been obligated to honor such a request under successorship principles,[1] there is no basis for finding that the Respondent unlawfully refused to recognize the Union.

Dated, Washington, D.C. 19 October 1984

Robert P. Hunter, Member

NATIONAL LABOR RELATIONS BOARD

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[1] I find it unnecessary to consider the Respondent's argument that the judge erred in imposing a bargaining obligation on the date that a representative complement of employees was employed by the alleged successor employer, and that the proper date for determining whether any bargaining obligation may arise pursuant to a recognition demand of a union which represented the predecessor's employees is the date that the alleged successor employed a full complement of employees.

JD-25-84
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

FALL RIVER DYEING &
FINISHING CORP.

and

Case 1-CA-20391

UNITED TEXTILE WORKERS
OF AMERICA, AFL–CIO,
LOCAL 292

Robert Redbord, Esq., of
Boston, MA, for General Counsel.
James W. Clarkin, Esq., of Fall
River, MA, for Respondent.
Mr. James Lenehan, of Providence,
RI, for Charging Party.

DECISION

Statement of the Case

BURTON S. KOLKO, Administrative Law Judge: Upon a charge filed on November 1, 1982 by the United Textile Workers of America, AFL-CIO, Local 292, a complaint issued on December 21, 1982 against Fall River Dyeing and Finishing Corp. (herein Respondent) alleging violation of Sections 8(a)(1) and (5) of the Act. The Matter was heard before me in Boston, Massachusetts on May 2, 1933, and was briefed on August 5, 1983.

The case centers around whether Respondent is a successor to Sterlingwale Corporation. If it is, the second question arises – did it violate the Act by refusing to recognize and bargain with the Union? I find that Respondent is a successor and did violate the Act by refusing to recognize and bargain with the Union once it had a representative complement of workers the majority of whom were former employees of Sterlingwale.

Successorship

Sterlingwale Corp. in Fall River had been in business for over 30 years before it closed in 1982. The business involved mainly the dyeing and finishing of textiles, and a small amount of retail sales. Sterlingwale had handled both flat goods and corduroy fabrics. Although it had been both a converter of fabrics and a commission dyer, it moved more toward commission dyeing as it suffered economically.

Converter work meant that goods were purchased by Sterlingwale, then dyed and finished for sale in the marketplace. Commission dyeing involved the receipt of goods from a customer, the dyeing and finishing of the goods and the return of those goods to the customer. Leonard Ansin, president of Sterlingwale, testified that from an employee's viewpoint, the production process for either converter goods or commission goods was the same. In addition, the production process for corduroy and flat goods was similar. (Corduroy required backsizing and some cutting and post-cutting inspection.)

Ansin testified that beginning in 1979, Sterlingwale had financial problems. By February 1982, Ansin decided to close Sterlingwale. On February 12 he laid off all the production

employees.[1] From then until August 1982, Sterlingwale maintained a skeletal existence. A few people were still employed there throughout this period. They maintained the building, shipped out remaining goods, and kept watch over the machinery. In August, Sterlingwale went under. There was an assignment for the benefit of creditors. An auction was held of Sterlingwale's property. Through a series of complex transactions, Respondent purchased all the machinery, equipment, furniture and fixtures of Sterlingwale. It purchased some of Sterlingwale's materials and inventory at auction. It bought Sterlingwale's premises and moved in during September 1982.

The traditional test for determining successorship is whether there is substantial continuity in the employing enterprise.[2] The factors used in making this determination are: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment and methods of production; and (7) product or service.[3]

Respondent places great emphasis on the fact that it is solely a commission dye house, while Sterlingwale was mainly a converter of fabric. Respondent urges that this results in a difference in the nature and identity of the enterprise. I disagree. The

[1] Sterlingwale employees were represented by United Textile Workers, Local 292, in a production and maintenance unit for about 30 years. Such recognition was embodied in successive collective bargaining agreements, the most recent of which was extended to April 1, 1981 (G.C. Exh. 13).

[2] *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 279-281 (1972).

[3] *Aircraft Magnesium, a Division of Grico Corp.*, 265 NLRB No. 172 (1982) at pg. 6 (sl. op.).

business is, like Sterlingwale, dyeing and finishing of fabric. The fact that Respondent does something different before and after the production process is completed does not result in any essential difference. The enterprise is not identical, but it is similar.

Respondent uses the same production building, with the same machinery as Sterlingwale did. It retained most of the same job classifications. (Respondent has no retail store and fewer inspectors of fabric.) Norman Rego, an employee for 20 years at Sterlingwale and now employed by Respondent, testified that as far as he can tell, the machines are the same, the jobs are the same, and the supervision is the same. (Tr. 113-115) Respondent did not start a new service or product line.

Continuity of customers has also been considered as a factor in determining continuity in the employing industry. General Counsel Exhibit 10 indicates that in dollar volume over one-half of the current customers of Respondent were customers of Sterlingwale. Thus, a substantial part of Respondent's business is linked with Sterlingwale. On these bases I conclude that Respondent was a successor to Sterlingwale.[4]

Demand for Bargaining

A new employer has an obligation upon request to bargain with the Union if a majority of the unit employees hired were unit employees of the predecessor employer. The demand for

[4] I make this finding despite the fact that there was a seven-month hiatus between the ending of Sterlingwale and the beginning of Fall River Dyeing. Generally, a hiatus is only material in determining successorship status when there have been other substantial changes in the enterprise. *Aircraft Magnesium, supra; United Maintenance & Manufacturing Co., Inc.*, 214 NLRB 529, 532 (1974).

bargaining by the Union must be made when the new employer is operating at a representative capacity. However, if the new employer is not at that capacity at the time of the demand, the demand is of a continuing nature. Once the employer reaches a representative capacity, the bargaining obligation will attach.

Respondent hired its first employees on September 20, 1982. The Union demanded recognition by letter dated October 19, 1982. Respondent denied recognition by letter dated October 21, 1982.

Twenty-one employees had been hired by October 22. Eighteen of them were former Sterlingwale employees. Herbert Chace, who had worked at Sterlingwale and is now executive vice-president and secretary for the Respondent, testified that after the first hirings in September the employees spent approximately 4-6 weeks of start-up: cleaning, repairing machines, and so forth. Then they began 4-5 weeks of experimental production, just to make sure everything was in working order. (Tr. 185-187.) Chace agreed with employee Rego's testimony that the first shift was at almost full operating level when a second shift was commenced in January 1983. Chace also testified that their production goal was to have two full shifts working by mid-April. Respondent asserts that since a full complement of workers was not reached until then, it is at that point that one should inquire as to the status of former Sterlingwale employees. Presumably this argument is pressed because the evidence indicates that in the week ending March 24, 1983, former Sterlingwale employees were, for the first time, a minority of the unit.

However, the standard to be used indicated by the Board is representative complement, not full complement.[5] By late November 1982, employees had been hired in all job titles.

[5] *Aircraft Magnesium, supra.*

Accounts receivable in November 1982 from previous months totalled $145,001.38 (Tr. 188). Clearly, the business was gearing up. Since we have testimony from Chace and Rego, above, which points to January 1983 as a time when the plant was running one shift at full capacity, I find that the duty to bargain with the Union attached for the Respondent in mid-January 1983.

Respondent contends that since it did not purchase Sterlingwale directly, it should not be held to be a successor. This argument fails since direct purchase from a predecessor is not a prerequisite to successorship.[6]

Since Respondent has refused to bargain with the Union, it has violated Section 8(a)(5) and (1) of the Act.

Conclusion of Law

1. Respondent, Fall River Dyeing and Finishing, is an employer within the meaning of Section 2(2) of the Act and engaging in commerce within the meaning of Section 2(6) and (7) of the Act.[7]

2. United Textile Workers of America, AFL-CIO, Local 292, is a labor organization within the meaning of Section 2(5) of the Act.

[6] Cf. *Makaha Valley, Inc.*, 241 NLRB 300, 303 (1979), where an intervening trusteeship did not defeat successorship status.

[7] Based upon a projection of its operations since on or about August 1982 at which time Respondent commenced operations, Respondent, in the course and conduct of its business of dyeing and finishing textiles and related products, will annually provide services valued in excess of $50,000 for customers located outside the Commonwealth of Massachusetts, and in excess of $50,000 for enterprises located within Massachusetts, who themselves are directly engaged in interstate commerce.

3. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Fall River plant, including the electrician, electrician's helper, and mechanics but excluding all executives, office clerical and plant clerical employees, second hands, guards, and professional employees and supervisors as defined in the Act.

4. United Textile Workers, of America, AFL-CIO, Local 292, has been and is the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 15, 1983 and at all times thereafter to recognize and bargain collectively with the above-named labor organization as the exclusive representative of all its employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor pratices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it shall cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fall River Dyeing and Finishing, Fall River, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Textile Workers of America, AFL-CIO, Local 292, as exclusive representative of the following unit:

> All production and maintenance employees at the Fall River plant, including the electrician, electrician's helper, and mechanics but excluding all executives, office clerical and plant clerical employees, second hands, guards, and professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercies of their rights under Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon the request, bargain with the above-named Union as exclusive representative of employees in the above-described unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Post at its Fall River, Massachusetts, plant copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: January 27, 1984.

Burton S. Kolko
Administrative Law Judge

[8] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE
UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and had ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with United Textile Workers of America, AFL-CIO, Local 292, as exclusive representative of the following unit:

> All production and maintenance employees at the Fall River plant, including the electrician, electrician's helper, and mechanics but excluding all executives, office clerical and plant clerical employees, second hands, guards, and professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain collectively with the aforesaid Union as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, hours of employment and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

FALL RIVER DYEING & FINISHING CORP.
(Employer)

Dated _____ By _____ _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

120 Boylston Street, Walker Building, 3rd Floor,
Boston, MA 02116, Telephone No. (617) 223-4550.

APPENDIX "E"

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29

"§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a),

"§159. Representatives and elections

(a) Exclusive representatives – Employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions or employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided* further, That the bargaining representative has been given opportunity to be present at such adjustment."

OPPOSITION

BRIEF

(2)

No. 85-1208

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FALL RIVER DYEING & FINISHING CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether the National Labor Relations Board properly found, in the circumstances of this case, that petitioner is a successor employer and that it violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by refusing to recognize and bargain with the union that had represented the predecessor's employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1208

FALL RIVER DYEING & FINISHING CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A30) is reported at 775 F.2d 425. The decision and order of the National Labor Relations Board (Pet. App. A31-A43) are reported at 272 N.L.R.B. 839.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on October 18, 1985. The petition for a writ of certiorari was filed on January 16,

1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For more than 30 years prior to 1982, the Sterlingwale Corporation operated a plant in Fall River, Massachusetts, where it engaged primarily in dyeing and finishing textiles. Sterlingwale's production and maintenance employees were represented by United Textile Workers of America, AFL-CIO, Local 292. The parties' last collective agreement extended to April 1, 1982. Pet. App. A35, A36 n.1; C.A. App. A370, A375.

Sterlingwale's operations consisted of both "converting" and "commission dyeing." As a converter Sterlingwale bought unfinished fabrics for its own account, dyed and finished them, then sold the fabrics to apparel manufacturers. Working as a commission dyer, Sterlingwale dyed and finished fabrics owned by other customers to the customers' specifications. In its early years, Sterlingwale had engaged almost exclusively in commission dyeing, but in the early 1970s it shifted into principally converter work. When it encountered economic problems in 1979, Sterlingwale again began shifting toward commission work. Although the financing and marketing aspects of the two types of business varied, the production process for dyeing and finishing fabrics was the same whether the work was done on a converting or commission basis. Pet. App. A35; C.A. App. A112-A113, A141-A143, A146-A147.

As a result of its economic problems, Sterlingwale laid off all its production employees in February 1982. From that time until August, Sterlingwale maintained a skeletal operation of employees who

maintained the plant and shipped remaining inventory. Pet. App. A35-A36; C.A. App. A166-A167. During this period Sterlingwale's president still hoped to resurrect the business or have "somebody take over the plant," and he communicated this interest to union representatives during meetings held in the summer of 1982 (C.A. App. A82, A102, A165-A166).

In August 1982, however, Sterlingwale went out of business and executed an assignment of assets for the benefit of its creditors. Through another corporation, Arthur Friedman, the president of petitioner Fall River Dyeing and Finishing Corp., acquired Sterlingwale's plant and real property, all of its equipment, and part of its materials and inventory at a mortgage foreclosure sale. Friedman's corporation conveyed the equipment and materials and leased part of the plant and property to petitioner. Pet. App. A36; C.A. App. A67, A130-A131, A158-A159, A195, A218-A222, A256.

Petitioner began operating out of the former Sterlingwale production building in September 1982. Petitioner performed commission dyeing and finishing work as had Sterlingwale, but it did this type of work exclusively, performing no converter work and introducing no new service or product line. The production process remained basically unchanged and the employees performed the same jobs that had been performed at Sterlingwale. Petitioner used the machinery formerly used by Sterlingwale and retained most of the same job classifications. Pet. App. A36-A37; C.A. App. A172-A175, A219-A220, A222, A327-A331. Petitioner's vice president and secretary formerly served as vice president of Sterlingwale. Eight of petitioner's supervisors were former Sterlingwale supervisors and three of the other four were former

Sterlingwale employees. Over half of the dollar volume of petitioner's business came from former Sterlingwale customers. Pet. App. A37-A38; C.A. App. A209, A216, A229-A230, A330.

Upon commencing operations in September 1982, employees spent four to six weeks on start-up operations, cleaning and repairing machines. They spent the next four or five weeks on experimental production to ensure that everything was in working order. Pet. App. A38; C.A. App. A226-A227, A246-A248. On October 19, 1982, the Union requested that petitioner recognize it and proposed a date for collective bargaining negotiations. On October 21, petitioner responded that it did "not intend to comply with your request" and that the Union's bargaining request had "no legal basis." Pet. App. A38; C.A. App. A380, A381.

At the time of petitioner's refusal to bargain, petitioner had hired 21 employees, 18 of whom were former Sterlingwale employees (Pet. App. A38). Petitioner's initial production goal was to reach one full shift operation of 55 to 60 employees. After that goal was achieved, petitioner planned to "see how business would be, and then expand to a two-shift operation by April 1983" (Pet. App. A38; C.A. App. A227-A228).

By November 1982, employees had been hired in virtually all job classifications. In mid-January 1983, the first shift was in full operation and petitioner had begun a second shift. At that time, petitioner had hired at least 50% of those it would ultimately employ in the majority of existing job classifications and 55 of the 106-109 employees it was to employ by April, when it reached its anticipated employee complement. Of the 55 employees hired by mid-

January, 36 were former Sterlingwale employees. Pet. App. A5, A31-A32 n.1, A38; C.A. App. A68-A69, A425, A327-A331. By April, former Sterlingwale employees were for the first time less than a majority of petitioner's workforce (Pet. App. A38).

2. Adopting the opinion of the administrative law judge (Pet. App. A31-A32), the Board, with one member dissenting, found that the change of ownership did not materially alter the employees' working conditions or the nature of the enterprise, and that petitioner employed a substantial and representative complement of employees, a majority of whom had been employed by Sterlingwale, on January 15, 1983. Based on that finding, the Board concluded that petitioner was a successor employer to Sterlingwale and was obligated to bargain with the Union as of that date (*id.* at A31-A32 n.1, A35-A37). The Board also concluded that the Union's October bargaining request constituted a continuing demand for recognition and bargaining (*id.* at A31-A32 n.1, A37-A39). Accordingly, the Board ruled that petitioner was the successor to Sterlingwale and violated the National Labor Relations Act (the Act) by refusing to recognize and bargain with the Union once its bargaining obligation arose (*ibid.*). The Board's order required petitioner to bargain with the Union upon its request (*id.* at A41).[1]

3. The court of appeals, one judge dissenting, enforced the Board's order (Pet. App. A2-A30). The court upheld as supported by substantial evidence the Board's finding that petitioner was the successor to

---

[1] Board Member Hunter dissented on the ground that petitioner did not have a representative complement of employees on the date that the union demanded recognition (Pet. App. A33).

Sterlingwale (*id.* at A8). The differences between petitioner's business and Sterlingwale's, the court explained, "are only indirectly related to the interests" of the bargaining unit employees in representation and "are not sufficiently significant to require a finding that the continuity of the enterprise, viewed from the employees' standpoint, was broken" (*id.* at A9). In addition, the court ruled that, where it cannot be determined at the outset of the transition whether a union represents a majority of a new owner's employees, the Board may fix as the date for determining the successor bargaining obligation that point at which the new owner has hired a " 'substantial and representative complement' " of its employees (*id.* at A10-A12). Moreover, the court upheld as reasonable the Board's findings that petitioner's level of operations was near-normal by mid-January 1983 and that petitioner had hired a substantial and representative employee complement by that time. Accordingly, because a majority of the workforce had been represented by the union at Sterlingwale, the court ruled that petitioner's bargaining obligation attached at that point. *Id.* at A12. Finally, the court upheld the Board's conclusion that the union's October 1982 bargaining demand constituted a continuing request for recognition and bargaining that petitioner was required to honor once it had hired a representative complement of employers in January 1983. Noting that a union, unlike the successor business, often lacks precise information about the timing and nature of a transition, that it is not uncommon for bargaining demands to be made before a bargaining obligation actually arises, and that a union's presumption of majority status is not affected by a change of ownership, the court concluded that it is not unreasonable to require a successor to respond to a previously made request to bargain once its bargaining obligation actually matures (*id.* at A14).[2]

ARGUMENT

The decision of the court of appeals correctly applied settled legal principles to the particular facts of this case and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner challenges (Pet. 8-15) the Board's finding that petitioner was the successor to Sterlingwale. That claim lacks merit.

It is well-settled that a mere change of employers or ownership does not eliminate the presumption that a majority of employees continue to support an incumbent union. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 277-279 (1972). Accordingly, where there is no essential change in working conditions or in the nature of the enterprise and a majority of the new employees were employed by the predecessor firm, the new employer is the "successor" to the former one and must recognize and bargain with the incumbent union as the representative of its employees (*ibid.*). Among the factors that the Board considers in determining whether a new employer is a successor are whether the new employer

---

[2] Judge Torruella dissented (Pet. App. A17-A30). In his view, petitioner's bargaining obligation did not arise until it had attained a full complement of employees (*id.* at A21-A25). He also concluded that, on the facts of this case, petitioner was not a successor employer to Sterlingwale (*id.* at A25-A27) and that the Board's order should not be enforced because petitioner had a "good-faith doubt" about the union's continued majority status in mid-January 1983 (*id.* at A28-A30).

is using the same supervisory personnel, equipment, and facilities as its predecessor, whether it is producing the same goods or providing the same services, whether it is serving the same customers, and whether there is a substantially identical workforce. Pet. App. A7, A36; see also, *e.g.*, *Burns*, 406 U.S. at 280 n.4; *NLRB* v. *Jeffries Lithograph Co.*, 752 F.2d 459, 463 (9th Cir. 1985); *NLRB* v. *Hudson River Aggregates, Inc.*, 639 F.2d 865, 869 (2d Cir. 1981); *IUEW* v. *NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979); *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 6-8 (1st Cir. 1978); *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), enforced, 709 F.2d 623 (9th Cir. 1983). The question whether a change of ownership has produced a substantial and material alteration in the employing enterprise is "highly fact specific" (*Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel Employees Int'l Union*, 417 U.S. 249, 256 (1974)), and the Board's finding, which is based upon "the totality of circumstances" (*NLRB* v. *Boston Needham Industrial Cleaning Co.*, 526 F.2d 74, 77 (1st Cir. 1975)), must be upheld if there is substantial evidence to support it (see, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *Jeffries Lithograph Co.*, 752 F.2d at 462; *Hudson River Aggregates*, 639 F.2d 869).

Petitioner contends (Pet. 8-9) that the Board "arranged the facts and weighted them in such a way as to ignore, or give little or no weight to certain facts while at the same time stressing other facts which are not dispositive of the issue." Petitioner's admittedly fact-bound contention does not warrant this Court's review.[3] In any event, there is ample

[3] Petitioner erroneously suggests (Pet. 9) that the Board's factual analysis in successorship cases is entitled to less deference on appellate review than are its fact findings in other types of cases. As the case that petitioner cites itself makes clear, in the successorship context no less than in other areas the responsibility of applying broad legal principles to particular cases is "committed primarily to the Board," and the Board's decisions in successorship cases are entitled to deference as long as they are compatible with "the spirit as well as the language" of the Court's decision in *Burns*. *International Ass'n of Machinists* v. *NLRB*, 595 F.2d 664, 673 n.41 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979).

support in the record for the Board's finding that the change in ownership did not cause a material alteration in employees' working conditions or in the nature of the enterprise. As the Board and the court of appeals found (Pet. App. A4-A5, A36-A37), petitioner acquired Sterlingwale's real property, all of its machinery, furniture, and fixtures, and part of its materials and inventory. The basic dyeing and finishing operation, the physical plant and production process, the job classifications, and the supervision remained substantially the same. Petitioner's arguments to the contrary are insubstantial.[4]

[4] As the court of appeals explained (Pet. App. A8-A9), the changes on which petitioner relies (Pet. 11-14)—a change from three shifts to two and a reduction in the total number of supervisors—reflect simply a reduction in the size and scope of the operation, not an essential change in the enterprise. Similarly, the changes in purchasing, financing, and marketing associated with the switch to straight commission dyeing were not the kind of changes likely to have a significant effect on employer-employee relations or the employees' attitude toward representation. See *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 627 (9th Cir. 1983).

Finally, petitioner's reliance on the hiatus between Sterlingwale's closing and petitioner's resumption of operations is also misplaced. As the Board and the court of appeals explained (Pet. App. A8, A37), absent other factors showing a material

2. Petitioner also contends (Pet. 16-19) that the Board erred by applying a "substantial and representative employee complement" standard in determining when petitioner's bargaining obligation arose. In petitioner's view, the Board was required to wait until it had hired its full complement of employees before determining whether it was required to bargain with the union. The Board and the court of appeals properly rejected this contention.

Although the question whether a successor business incurs the predecessor's bargaining obligation is normally determined at the time of transfer, where, as here, an employer is rebuilding a collapsed business or is operating initially at a substantially reduced capacity, that principle does not apply. For instance, this Court explained in *Burns* that in some cases, "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit" (406 U.S. at 295). However, contrary to petitioner's contention, this dictum has never been construed as requiring this determination to be postponed until

---

transformation of the enterprise, such a hiatus is reasonably viewed as part of the " 'normal concomitants of a new management and a new approach to a failing business, not a break in the continuity of the employing industry.' " *NLRB* v. *Middleboro Fire Apparatus*, 590 F.2d at 8. Petitioner's claim that the hiatus destroyed any reasonable expectation that employees would be rehired belies the evidence (page 3, *supra*) that Sterlingwale's president told the union throughout the summer of 1982 that he hoped to have "somebody take over the plant" and that petitioner in fact did so in the early Fall.

the new business is operating at its peak capacity or until the new employer has hired all of its bargaining unit employees. That issue was not presented in *Burns*,[5] and the Board and the courts of appeals are in agreement that, when the successorship obligation cannot be determined at the outset, fixing the appropriate date involves striking a balance between the objective of insuring maximum employee participation in the selection of a bargaining agent and the goal of permitting employees to be represented as quickly as possible. See *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 628 (9th Cir. 1983); *Hudson River Aggregates*, 639 F.2d at 870-871; *NLRB* v. *Pre-Engineered Building Products, Inc.*, 603 F.2d 134, 136 (10th Cir. 1979). As the court below found (Pet. App. A10), these interests are effectively reconciled by the Board's "substantial and representative complement" standard, and that standard has also been approved by every other court that has considered it. See *Jeffries Lithograph Co.*, 752 F.2d at 467; *Premiums Foods*, 709 F.2d at 628; *Hudson River Aggregates*, 639 F.2d at 870 ("full complement" and "representative complement" used interchangeably); *Aircraft Magnesium*, 265 N.L.R.B. 1344, 1345 (1982), enforced, 730 F.2d 767 (9th Cir. 1984) (Table); see also *Pre-Engineered Building*

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[5] In *Burns*, the Court simply distinguished between the situation in which a successor takes over the predecessor's ongoing operations and complete workforce and those cases in which a successor delays hiring decisions until after the actual transfer of ownership. Accordingly, the Court had no occasion to consider at precisely what point in the latter category of cases it would be appropriate to examine the successor's workforce.

Products, Inc., 603 F.2d at 136 & n.1.[6] Accordingly, there is no occasion for the Court to review that standard in this case.

3. Finally, there is no merit to petitioner's contention (Pet. 20-22) that the Board's continuing demand rule improperly compels an employer to bargain with a union where a good faith doubt existed as to its majority status.

In successorship situations, when an incumbent union makes a clear request for bargaining in an appropriate unit and that demand is rejected by the employer, the Board generally treats the demand as continuing and does not require the union to renew the request at a later time, even if the employer's bargaining obligation had not matured at the time of the original request. See *Aircraft Magnesium*, 265 N.L.R.B. at 1345 n.9. The court of appeals properly concluded that the Board's continuing demand rule is a reasonable exercise of the Board's discretion under the Act. As the court explained (Pet. App. A13-A14 (citations, footnotes, and quotation marks omitted)):

> When a continuity in the enterprise has been found, as is the case here, the presumption of majority status by the union under the predecessor . . . is not affected by a change in ownership. * * * The rationale behind this presumption of majority status derives from the fact that a successor's obligation to bargain with the union arises when the employer reaches a substantial and representative complement of its work force. The employer, unlike the union, can readily reach this determination on its own by examining whether the job classifications for the operation have been filled or substantially filled and whether the operation is in normal or substantially normal production.

[6] Petitioner concedes (Pet. 18) that it employed a substantial and representative complement of employees as of mid-January 1983.

Moreover, as the court of appeals noted (Pet. App. A14), the Board's rule is also eminently practical. Unions often lack precise information about when a change in ownership is to take place and what plans, if any, the new owners have for the enterprise. It is therefore not uncommon for bargaining demands to be made before the bargaining obligation actually arises.[7]

Petitioner's reliance (Pet. 20, 22) on *Hedstrom Co.* v. *NLRB*, 558 F.2d 1137 (3d Cir. 1977), is misplaced. *Hedstrom* rejected the continuing demand concept only in a non-successorship case where the union made its initial bargaining demand without majority support. The court found that applying the continuing demand rule in that situation would put an employer in the untenable position of either violating Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by recognizing a union lacking majority support, or risking a violation of Section 8(a)(5), 29 U.S.C. 158(a)(5), by refusing to bargain at a later point when, unknown to the employer, the union actually obtained majority support (558 F.2d at 1148). However, as the court of appeals explained (Pet. App. A13-A14), those concerns are absent in the successorship context, because there is a presumption of the

[7] See, *e.g.*, *Hudson River Aggregates*, 639 F.2d at 868, 870; *Saks & Co.* v. *NLRB*, 634 F.2d 681, 684-685 (2d Cir. 1980); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026 (7th Cir. 1969); *Aircraft Magnesium*, 265 N.L.R.B. at 1345.

Union's continued majority status and because the employer is in a superior position to know the facts that trigger its bargaining obligation. Indeed, the Board's decisions applying the continuing demand rule in successorship cases have been uniformly approved by the courts of appeals. See page 13 note 7, *supra*.[8]

[8] There is no merit to petitioner's suggestion (Pet. 20-21) that it was improper for the Board to find a refusal to bargain as of January 1983, even though the unfair labor practice charge and complaint issued prior to that time. Petitioner does not contend that it was not on notice in the unfair labor practice proceeding of the General Counsel's theory that it violated the Act as of mid-January, and the Board's order imposes no obligation on petitioner with respect to its conduct prior to the time the bargaining obligation actually arose.

Moreover, the facts in this case demonstrate that it would have been futile to require the union to renew its bargaining request after it was first made. After petitioner rejected the union's October demand—with no suggestion that it might later change its mind—the union made clear that it still sought recognition by filing an unfair labor practice charge on November 1. In its answer to the unfair labor practice complaint issued by the General Counsel, petitioner admitted that on October 21 (when it formally rejected the union's demand) "and at all times thereafter," it "did refuse and *continues to refuse*" to bargain, with the union (C.A. App. A5, A8 (emphasis added)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY

BRIEF

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No. 85-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FALL RIVER DYEING & FINISHING CORP.,

Petitioner,

— against —

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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This case requires a reexamination of the successorship principles heretofore enunciated by this Court to ensure that statutorily protected rights of employees and employers are not violated by principles and concepts adopted by the National Labor Relations Board.

As has been previously noted, the former employees of Sterlingwale worked under a succession of collective bargaining agreements for approximately 30 years, involving the same Union, Local 292, the last of which expired April 1, 1982. The collective bargaining agreements contained standard Union security provisions permitted by Section 8(a)(3) of the Labor Management Relations Act, as amended. As a result, any employee who had worked for Sterlingwale since the Union was recognized, and any

employee hired by Sterlingwale during the ensuing 30 years until its financial demise in the early spring of 1982 did not express their preference with regard to their choice of a bargaining representative.

The Board's continuing demand theory in this case rests upon the presumption of majority status by the Union under the predecessor employer's ownership (Respondent's Brief, pp. 12-14). Petitioner urges that the Board's continuing demand concept is not applicable where the Union made its initial bargaining demand without majority support, as is undisputedly the situation herein. The Board urges in its Brief (p. 13) that petitioner's reliance on Hedstrom Co. v. NLRB, 558 F.2d 1137 (3rd Cir. 1977), is misplaced.

In Hedstrom, supra, the Court rejected

the Board's concept, in an unfair labor practice context, reasoning that if it were adopted, the employer might be forced to violate Section 8(a)(2) of the Act by recognizing a minority union. The Board urges in its Brief (p. 13) that Hedstrom is not applicable to a successorship case and rests its argument on the analysis of the Court of Appeals hereinbelow (Pet. App. A13-A14). This, in turn, rests on the presumption of the Union's continued majority status. It is indeed difficult to reconcile this presumption under the facts of this case and in light of the holding of this Court in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), at 295, with regard to "successorship" situations where the bargaining obligation cannot normally be determined at the time of transfer of ownership or when actual operations began. As the Supreme

Court stated in Burns, supra,

> "In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees as required by Section 9(a) of the Act..."

This Court, in Burns, supra, and in all of its successorship decisions has noted that Section 9(a) of the Act establishs a strong public policy favoring free choice of a bargaining agent by the employees which should not be lightly frustrated or impinged upon. The concurrent application by the Board in the instant case of its presumptions of continuation of majority status and its continuing demand concept does just that. Those principles, when applied simultaneously, deprive employees, who have not expressed their desire with regard to

Union representation for 30 years, of their right of free choice, and saddle the employer with the impossible choice heretofore noted by the Court in Hedstrom, supra.

The Language of Chief Judge Campbell in his dissent in NLRB v. Band-Age, Inc., 534 F.2d 1 (1st Cir.), cert. denied, 429 U.S. 921 (1976) is appropriate. Judge Campbell stated:

> "The premise of the National Labor Relations Act is industrial democracy, requiring an employer to bargain with the representative of a majority of its employees. This democratic principle must, of course, yield to practicality and the need for industrial peace, as rules limiting the frequency of elections illustrate. But such rules, presuming the continuity of majority sentiment, evolved within the frame of a single enterprise. While they may be appropriately extended to genuine successor entities, they should not apply where the original bargaining unit and nature of the enterprise have

> been radically altered. I fear that the enlargement of the successorship doctrine to accommodate such a case may sweep aside the requirement that the Union has roots in the actual wishes of the employees. Here it would be simple to require an expression of the wishes of the 37 current employees rather than to presume, somewhat woodenly, that the earlier-expressed wishes of a different group of employees working for a different employer remain effective." 534 F.2d at 7 (citations omitted).

In conclusion, it is respectfully submitted that the conflicting presumptions and concepts of the National Labor Relations Board, as applied in the successorship context herein, warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 23, 1986

JOINT

APPENDIX

(3)

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No. 85-1208

In the Supreme Court of the United States

October Term, 1985

FALL RIVER DYEING & FINISHING CORP.,
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari filed January 16, 1986
Certiorari granted May 27, 1986

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Fall River Dyeing & Finishing Corp.
Board Case No. 1-CA-20391

Date	*Documents*
11.01.82	Charge
12.21.82	Complaint and Notice of Hearing
01.06.83	Respondent's Answer
05.02.83	Hearing
01.27.84	Administrative Law Judge's Decision
03.26.84	Respondent's Exceptions to Decision and Order of Administrative Law Judge
10.19.84	Decision and Order
10.18.85	DECREE: The application for enforcement is granted and the order of the NLRB is hereby affirmed and enforced. Opinion of the Court by Rubin, J. and Dissenting Opinion by, Torruella, J. Notices mailed.
11.12.85	Mandate issued, copy filed, taxation of costs filed.
01.27.86	Notice of filing Petition for Certiorari, (85-1208) January 16, 1986.
06.02.86	Order of Supreme Court granting the Petition for Writ of Certiorari (85-1208) May 27, 1986.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NO. 1-CA-20,391

In the Matter of
FALL RIVER DYEING & FINISHING CORP.

and

UNITED TEXTILE WORKERS OF AMERICA,
AFL-CIO, LOCAL 292

COMPLAINT AND NOTICE OF HEARING

It having been charged by United Textile Workers of America, AFL-CIO, Local 292, 207 Union Avenue, Providence, Rhode Island (herein called the Union) that Fall River Dyeing & Finishing Corp., 160 Stevens Street, Fall River, Massachusetts (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act) the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Acting Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1. The Charge in this proceeding was filed by the Union on November 1, 1982 and a copy thereof served upon Respondent on November 2, 1982.

2. Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

3. At all times herein mentioned, Respondent has maintained its principal office and place of business at 160 Stevens Street, in the City of Fall River, and Commonwealth of Massachusetts (herein called the plant), and is now and continuously has been engaged at said plant in the business of dyeing, finishing and printing of textiles and related products.

4(a) Based upon a projection of its operations since on or about August, 1982 at which time Respondent commenced its operations, Respondent, in the course and conduct of its business operations described in Paragraph 3, will annually provide services valued in excess of $50,000 for customers located outside the Commonwealth of Massachusetts.

(b) Based upon a projection of its operations since on or about August, 1982, at which time Respondent commenced its operations, Respondent, in the course and conduct of its business operations described above in Paragraph 3, will annually provide services valued in excess of $50,000 directly for enterprises located within the Commonwealth of Massachusetts who themselves are directly engaged in interstate commerce.

5. The aforesaid Respondent is and has been engaged in commerce within the meaning of the Act.

6. The Union is a labor organization within the meaning of Section 2(5) of the Act.

7. At all times material herein, the following named persons occupied positions set opposite their respective names. and have been and are now agents of the Respon-

dent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act.

Arthur Friedman ..... President

Renee Kaban ..... Treasurer

George Speilberg ..... Secretary

Herbert Chace ..... Vice President

8(a) Sterlingwale Corporation (hereinafter Sterlingwale) was a Massachusetts corporation maintaining a principal office and place of business at 168 Stevens Street in the City of Fall River, Commonwealth of Massachusetts and was engaged at said facility from at least 1968 until February of 1982 in the business of dyeing, finishing and printing of textiles.

(b) On or about August, 1982 and at various times thereafter, Respondent purchased the assets of Sterlingwale, including the real estate, equipment, and machinery, and since that date has been engaged in the same business operations, at the same location, selling the same product and/or service to substantially the same customers, and has as a majority of its employees individuals who were previously employees of Sterlingwale.

9. By virtue of the operations described above in Paragraph 8(b), Respondent has continued the employing entity and is a successor of Sterlingwale.

10(a) The following employees of Sterlingwale constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees at its Fall River, Massachusetts plant, including the electrician, electrician's helper, and mechanics, but excluding all executives, office clerical and plant clerical employees, second hands, guards, professional employees and supervisors as defined in the Act.

(b) The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees at its Fall River, Massachusetts plant, including the electrician, electrician's helper, and mechanics, but excluding all executives, office clerical and plant clerical employees, second hands, guards, professional employees and supervisors as defined in the Act.

11. Since on or about 1968, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of Sterlingwale's employees in the unit described above in Paragraph 10(a) and since said date the Union has been recognized as such representative by Sterlingwale. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms and amendments for the period April, 1978 to April 1, 1982.

12. At all times since 1968, the Union by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of Sterlingwale's employees in the unit described above in Paragraph 10(a) for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

13. At all times since on or about August, 1982, and/or at all times since on or about September 20, 1982, the Union has been the designated exclusive bargaining representative of Respondent's employees in the unit described above in Paragraph 10(b), such status exists by virtue of Respondent's status as a successor to Sterlingwale, as described above in Paragraphs 8 and 9, and by virtue of the Union's status as designated exclusive bargaining representative, as described above in Paragraphs 10, 11, and 12.

14. At all times since on or about August 1982, and/or at all times since on or about September 20, 1982, the Union, by virtue of Section 9(a) of the Act, has been and is, the exclusive representative of the employees in the unit described above in Paragraph 10(b), for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

15. On or about October 19, 1982, by its International Representative, James Lenehan, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment, or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above in Paragraph 10(b).

16. On or about October 21, 1982, and at all times thereafter, Respondent did refuse and continues to refuse to meet and bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in Paragraph 10(b).

17. By the acts described above in Paragraph 16, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

18. By the acts described above in Paragraphs 16 and 17, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

19. The activities of Respondent, described above in Paragraphs 16, 17, and 18, occurring in connection with the operations of Respondent, described above in Paragraphs 3 and 4, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

20. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 2nd day of May, 1983, at 11 o'clock in the forenoon, Eastern Daylight Saving Time, at the Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise,

and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the First Region, on this 21st day of December, 1982, issues this Complaint and Notice of hearing against Fall River Dyeing & Finishing Corp., Respondent herein.

/s/ Michael F. Walsh
Acting Regional Director
National Labor Relations Board
First Region
Boston, Massachusetts

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
FIRST REGION

CASE NO. 1-CA-20, 391

IN THE MATTER OF:

FALL RIVER DYEING & FINISHING CORP.

—and—

UNITED TEXTILE WORKERS OF
AMERICA, AFL-CIO, LOCAL 292

ANSWER

1. Respondent admits the allegations contained in Paragraph 1.
2. Respondent admits the allegations contained in Paragraph 2.
3. Respondent admits the allegations contained in Paragraph 3.
4. (a) Respondent admits the allegations contained in Paragraph 4 (a) with the exception that Respondent did not commence operations until October, 1982.

   (b) Respondent admits the allegations contained in Paragraph 4 (b) with the exception that Respondent did not commence operations until October, 1982.
5. Respondent is without knowledge as to the truth of the allegations contained in Paragraph 5.

6. Respondent is without knowledge as to the truth to the allegations contained in Paragraph 6.

7. Respondent admits the allegations contained in Paragraph 7.

8. (a) Respondent is without knowledge as to the truth of the allegations contained in Paragraph 8 (a).

   (b) Respondent denies the allegations contained in Paragraph 8 (b).

9. Respondent denies the allegations contained in Paragraph 9.

10. (a) Respondent is without knowledge of the truth of the allegations contained in Paragraph 10(a).

    (b) Respondent denies the allegations contained in Paragraph 10(b).

11. Respondent is without knowledge of the allegations contained in Paragraph 11.

12. Respondent is without knowledge of the allegations contained in Paragraph 12.

13. Respondent denies the allegations contained in Paragraph 13.

14. Respondent denies the allegations contained in Paragraph 14.

15. Respondent admits the allegations contained in Paragraph 15 but states that the request referred to was based not on an alleged status of Respondent as a "successor" but upon language allegedly contained in a purported collective bargaining agreement be-

tween one "Sterlingwale Corporation" and the Complainant.

16. Respondent admits the allegations contained in Paragraph 16.

17. Respondent denies the allegations contained in Paragraph 17.

18. Respondent denies the allegations contained in Paragraph 18.

19. Respondent denies the allegations contained in Paragraph 19.

20. Respondent denies the allegations contained in Paragraph 20.

    WHEREFORE, Respondent demands that the Complaint be dismissed.

21. Further answering, Respondent specifically denies that it is a successor and that it is under any legal obligation to recognize or bargain with the Complainant.

FALL RIVER DYEING &
FINISHING CORP.

By Its Attorney,

/s/ James W. Clarkin, Esq.
P.O. Box 2542
257 North Main Street
Fall River, MA 02720
(617) 673-9191
January 4, 1983

(Certificate of Service omitted in printing.)

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Region One

Case # 1-CA-20,391

In the Matter of:

FALL RIVER DYEING & FINISHING CORP.

-and-

UNITED TEXTILE WORKERS OF AMERICA,
AFL-CIO, LOCAL 292

RESPONDENT'S EXCEPTIONS TO DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

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BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Region One

Case # 1-CA-20,391

In the Matter of:

FALL RIVER DYEING & FINISHING CORP.

-and-

UNITED TEXTILE WORKERS OF AMERICA,
AFL-CIO, LOCAL 292

RESPONDENT'S EXCEPTIONS TO DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

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BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Region One

Case # 1-CA-20,391

In the Matter of:

FALL RIVER DYEING & FINISHING CORP.

-and-

UNITED TEXTILE WORKERS OF AMERICA,
AFL-CIO, LOCAL 292

Fall River Dyeing and Finishing Corp., (the Respondent herein) Excepts to the Decision and Order of Administrative Law Judge, Burton S. Kolko, dated January 27, 1984 finding that Respondent had violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with United Textile Workers of America, AFL-CIO, Local 292 (hereinafter referred to as the Union).

STATEMENT OF CASE

This case raises several questions regarding the possible successorship status between Respondent and Sterlingwale Corp., and the extent to which successorship obligations are applicable. The Administrative Law Judge (hereinafter referred to as ALJ) found that Respondent is a successor to Sterlingwale Corp., and that Respondent violated the Act by refusing to recognize and bargain with the Union as of mid-January 1983. (Decision. p.4) Since the traditional standard for determination of successorship is whether there was a substantial continuity of the employing industry, particular care and attention must

be given to the pertinent facts as contained in the transcript, and Exhibits, which will now be reviewed.

Three witnesses testified on behalf of the General Counsel and one witness on behalf of Respondent. General Counsel's witnesses were James Lenehan, who was the International Representative of the United Textile Workers of America, the charging party, which had been the Union Representative at Sterlingwale Corp., (hereafter referred to as Sterlingwale) since 1953 (16)[1]; Leonard Ansin, who testified for the general Counsel, was the former President of Sterlingwale (51); Norman Rego also testified for the General Counsel. He was a former bargaining unit employee of Sterlingwale until approximately mid-February 1982 (111), and at the time of the Hearing he was employed by Respondent, performing production duties on behalf of Respondent (112). Rego was also the Secretary of the Union. (119) Herbert Chace testified for Respondent. Chace had been a former Vice President of Sterlingwale (149) and had been employed by Sterlingwale for 27 years. He is presently Vice President of Respondent (150) but performs very different duties for Respondent than he performed for Sterlingwale. (170, 191-192)

Sterlingwale was located in Fall River, Massachusetts. It was owned by the Ansin family for 30 years. Its business involved the dyeing and finishing of textiles as both a converter of fabrics and a commission dyer. As part of its converting business, it also engaged in a small amount of retail sales to textile companies and not to the general

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1 References are to pages in the Official Transcript.

public.[2] (91) The business of textile converting involves the purchase of griege goods or other fabrics for ones own account and then processing and finishing those goods and the sale of those goods directly to the apparel trade. (52-53,82) Sterlingwale's competition in the converting business was described by Ansin as the big giant vertical mills on the New York Stock Exchange such as Compton and Collins, Stevens, Greenwood, Dan River, Burlington, plus Japanese, Hong Kong and European competitors.

Commission dyeing and finishing, on the other hand, involved the processing of griege goods or fabrics belonging to someone else and then after completion, shipping the goods at the customers direction, for a commission. (52-54,83)

At various times in its history, Sterlingwale engaged in converting and finishing work in varying percentages. Ansin estimated that in 1981 in terms of units, not dollars, Sterlingwale's work was approximately 60-70 percent converting and approximately 30-40 percent commission finishing. (108)[3] Respondent's business has at all times been 100 percent finishing. Respondent does not engage in the converting business. Although the physical work performed on the textiles does not significantly vary regardless of whether converting or commission finishing is involved,

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2 Estimated to be less than 5 percent of gross income by Ansin. (107) Annual total sales were estimated by Ansin to be $30 million a year.

3 Ansin testified that it was Corporate intention to run a combination converter fabric and commission finishing operation to keep the workforce employed for 12 years [sic] (60).

converting and commission finishing are in fact two different businesses. In a converting business, Sterlingwale had to have the cash to purchase unfinished griege goods, or other textiles, which, after processing, it would thereafter attempt to sell for a profit. The requirements of such a business are obvious. It requires a sales force[4] and textile suppliers, and more importantly, a different approach to business. Commission finishing, on the other hand, does not require the capital or cash investments required to purchase the goods. Ansin testified that the customers of a converter are apparel manufacturers (87), while customers of a commission dyeing and finishing house were different and would generally be other converters, some even competitors of Sterlingwale in the converting business. (87)

Ansin testified that in the 1970's Sterlingwale was primarily a converter, more especially, for corduroy. He testified that Sterlingwale ran into trouble typical of textile operations in the Northeast part of the United States, which have caused the demise of so many of them and the unemployment of which this Board may take official notice. In 1979 Sterlingwale finishing work in an attempt to cover its fixed expense.[5] (88) Ansin even had a study made which resulted in a determination that if the Company had gone through bankruptcy, as a commission finisher, the bankruptcy court would not allow it to maintain tice. In 1979 Sterlingware began to change the nature of its operations because of the impending loss of its export business, amounting to about one-third of its business. (85)

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[4] Sterlingwale maintained a sales office in New York City. (66)

Ansin attributed his company's business problems to the increasing value of the dollar and other problems beyond his control. (86) By 1980 Sterlingwale had totally lost its export market. (86) In 1981 Ansin considered that Sterlingwale was still primarily a converter and he testified that in peak years his firm converted 12-13 million yards per year fabric and that by 1981 they were down to about 45 or 55 percent. (86-87)

A pivotal circumstance of this case is the unique problem that Sterlingwale faced regarding its operations. Ansin testified that the only way to pay off the Company's debts was through converted fabric sales, not commission finishing sales.(87) This requirement obviously prevented Sterlingwale from modifying its former business and possibly surviving. Ansin alluded in his testimony to meeting a lot of resistance to change and a lot of problems within the company. (86) Ansin testified that he reached the conclusion at some point between 1979 and 1982 that Sterlingwale could not maintain itself if it was a 100 percent commission finisher. (87) He testified that after the cost of money went above 7 percent and the price of oil went from $18.00 to $32.00 a barrel, his Company did not have enough converting work to survive and that it took in commission finishing work in an attempt to cover its fixed expense.[5] (88) Ansin even had a study made which resulted in a determination that if the Company had gone through bankruptcy, as a commission finisher, the bankruptcy court would not allow it to maintain that business. (90-91) . The prognosis for Sterlingwale as a finisher was disasterous,

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[5] It is apparent that finishing work was unprofitable for Sterlingwale and was used for the twofold purpose of defraying fixed costs and providing full employment for the workforce.

". . . the way it was structured at that time. Based on paying normal wages." (91).

It is important to this case to be aware that Ansin had other than profit motives for maintaining the continued existence of Sterlingwale. According to Ansin, he hung on and tried to save the business because,

> "I owed that to the community. Cause we were—we employed people in that town for 30 years. I owed it to employees. There are people sitting in this room here who've been with the company for over 25 years; good people. But we just ran out of cash." (60)

According to Ansin, his family lost millions but stayed on because his family and the Directors felt that they owed it to the City and the Sterlingwale employees. (61)

But the time came when the business had to be shut down because it ran out of cash and according to Ansin, he could not buy one yard of fabric. (89) At that point, Ansin began an immediate voluntary liquidation of Sterlingwale. The exact number of production workers laid off by Sterlingwale in mid-February 1982 does not appear in the record. Lenehan, the International Representative of the United Textile Workers Union, testified that on February 12th, in excess of 150 people were laid off. (48-49) Ansin thereafter conducted a gradual liquidation of inventory up until the middle of July 1982. (72) During this period, a small number of Sterlingwale employees were retained to complete and ship out customers goods and to maintain equipment. (106-107) For practical purposes, all agree that Sterlingwale ceased its normal production operations in mid-February 1982, when production employees

were told by their supervisors that they were indefinitely laid off. When Ansin concluded his part of the liquidation an outside liquidator (Beacon) was brought in, in July 1982 to liquidate any remaining assets.

There was an assignment for the benefit of creditors by Sterlingwale, and a foreclosure on the premises occupied by Sterlingwale, all of which were owned either by Ansin or his family. In late August 1982, Marcamy Sales Corp. (hereafter called Marcamy) entered into an agreement (GC Exhibit 2) which gave Marcamy an option to purchase Sterlingwale's equipment. The agreement also provided for the purchase of Sterlingwale's real property at a foreclosure sale and the subsequent sale to Marcamy. Marcamy is owned by Arthur Friedman, the President of Respondent. (181) Respondent occupys part of the premises formerly occupied by Sterlingwale[6] and has acquired most of its machinery. Respondent is owned by Friedman. Friedman has no part in the day to day operations of Respondent. (190-191) Friedman is involved with the financial end of the business, (190-191). not the production and labor relations end. (190-191) Herbert Chace runs Respondent's plant. (191) Chace is a former Vice President of Sterlingwale. As such, he was basically involved with sales (191) and did not run the plant. Alfred Canuel was the Plant Manager for Sterlingwale. (191-192).

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[6] Respondent acquired only one of the three buildings formerly used by Sterlingwale, the Red building. Offices and production facilities are now consolidated into the Red building. The Green building formerly used by Sterlingwale for warehousing and production is not owned or used by Respondent. The Yellow building, formerly used by Sterlingwale for offices is neither owned nor used by Respondent.

Chace testified that Respondent has no intention of being a converter. (162) Respondent is a commercial dyer and finisher. (162) He testified that the only reason Respondent bought some griege goods at the liquidation auction of Sterlingwale's remaining assets in the late Summer of 1982, was to use those goods for experimental purposes in order to get the equipment running again and hence not damage goods of customers. (162)

Chace's testimony with regard to Respondent's business intention is extremely important. Chace testified that Respondent planned to have a two shift operation in effect by March or April of 1983. (168) That goal was reached towards the mid-end of April according to Chace. (168) The business and production plan of Respondent was clear. Respondent first hired approximately six or eight employees about September 20, 1982. (167) There was no production at that time as machinery had to be relocated from one building to another and other adjustments had to be made. (167) Respondent's projection and plan was to gradually increase production (which began four to six weeks after September 20th), (167), and then to gradually build up to a two full shift operation. (167-168) Chase explained that in the type of operation contemplated by Respondent, a second shift was mandatory. He testified that when there is an operation dealing dealing with "wet goods", once you start doing enough production, you must have a second shift to finish off the fabric.[7] (186)

Chace testified that after the gradual start up in the Fall of 1982, the first shift reached full operational level in

[7] Sterlingwale was operating on a three shift basis in February of 1982 when it closed down. (120) A multi-shift operation is clearly an essential element of the production process and not simply an expansion of operations.

January 1983. (184) The second shift was commenced in the middle part of January 1983. (184) Chace testified that by mid-April, 1983, the second shift was up to its full compement (166) and Respondent is now working two 10 hour shifts employing approximately 106 to 109 employees. (166-167) Prior to the week ending March 24, 1983, former Sterlingwale employees were a majority of the unit. In the week ending March 24, 1983, former Sterlingwale employees were, for the first time, a minority of the unit (Decision p. 4), the ALJ has found that Respondent's duty to bargain with the Union attached in "mid-January 1983".

Ansin does not have any interest in Respondent (80) There is no claim that Responent has any stock relationship or other interest in Respondent.

Evidence was introduced by the General Counsel (GC Exhibit 10) to attempt to establish that the customers of Respondent were also customers of Sterlingwale. The Exhibit deals with Respondent's customers between October 1982 and March 1983. There is no claim that Sterlingwale sold or in any way delivered its customers to Respondent.[8]

[8] The ALJ put substantial emphasis on current customers of respondent in finding respondent to be a successor to Sterlingwale and reasoned at p. 3 of Decision that since in dollar volume, over one-half of the current customers of Respondent were customers of Sterlingwale, a substantial part of Respondent's business is "linked" with Sterlingwale. This analysis is faulty. Firstly, there is no factual evidence in the record that the former customers of Sterlingwale which had been in business for 30 years, were customers at, or even near the time it closed down in February 1982. The time frame was never established (13, 73, 74, 101-104, 169, 170). Secondly, there was no evidence what happened to those customers between February 1982 and October 1982 (the date on GC Exhibit 10). The ALJ

(Continued on following page)

There is also no dispute that for approximately seven months, a hiatus existed in any production operations at the premises.

Ansin's testimony with regard to the trade, was enlightening on the subject of customers. According to Ansin, textile converters and apparel people come and go. The list (GC Exhibit 10) could be good today and six months from now you could have a brand new customer listing. In the textile industry, according to Ansin, names change quickly. You could have a new customer list with different names but really the same people. (74)

The Union represented the unit employees at Sterlingwale for many years prior to its closure. The last collective bargaining agreement (GC 11) dated April 1978, had been extended in October 1980 through April 1, 1982 by means of a written extension agreement (GC 13). Lenehan, the Union Representative, testified that the bargaining unit employees received an indefinite layoff on February 12, 1982. (21, 35) In June or July of 1982, prior to Ansin making an assignment for the benefit of creditors, Ansin told Lenehan that his attempts to put the Company back in

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(Continued from previous page)

also found that over one-half of the dollar volume of Respondent for the six month period covered in GC 10 came from customers of Sterlingwale (51 percent). This includes however, Marcamy Sales Corp., which as previously pointed out, is owned by Arthur Friedman, who owns Respondent. Without Marcamy Sales Corp., the percentage falls to 33 percent, significantly less than figures relied on by the ALJ. Most importantly however, there is nothing in the record to support the ALJ's conclusion that the fact that there may have been a carry over of customers "linked" Respondent and Sterlingwale. This is particularly true in view of Ansin's testimony that only 30-40 percent of Sterlingwale's business was finishing and dyeing.

business and become an employer again had failed. (106) The significance of this testimony is that the production employees at the time of their indefinite layoff in February of 1982 through July of 1982, had no expectation, based on any promises or developments, that they would ever be returned to employment with Sterlingwale, or that Sterlingwale's facilities would ever operate again. The fact that Sterlingwale's real estate was foreclosed and sold and that Ansin was conducting a slow liquidation provided ample evidence to anyone who wished to inquire, that there was no hope that Sterlingwale would rise from the ashes. As of late summer of 1980, Sterlingwale was moribund and there was no sign that Sterlingwale would ever resume its operations or that any successors would appear.

Sterlingwale owed hospitalization and life insurance premiums for January and February 1982 (36). The employees themselves had to pay $8,000.00 in premiums for January, February and March 1982 as the Union was unable to collect the sum from Sterlingwale. (36-37) Sterlingwale also failed to pay vacation, and severance pay. (46) The Union did not collect the sums owed, (42) and it did not take Sterlingwale to arbitration. (39-40)

Respondent, as heretofore noted, was a purchaser of part of the assets of Sterlingwale. Respondent did not assume any of the liabilities of Sterlingwale (168) nor did it take over any of Sterlingwale's insurance (168) nor did it receive any credit for workmen's compensation experience that Sterlingwale was entitled to as a result of Sterlingwale's operations. (169) Although there was testimony

that Sterlingwale's trade name was valuable, (170) Respondent made no attempt to acquire the trade name.[9] (170)

The ALJ rejected as evidence (R1, R2) but allowed as an offer of proof certain testimony from Chace regarding a poll of bargaining unit employees taken by Chace which indicated that the bargaining unit employees did not want the Union to represent them. (171) There had been prior testimony on that subject from Norman Rego, a witness called by the General Counsel. Rego, who was the Secretary of the Union, (119) had been formerly employed by Sterlingwale. He testified that he had been rehired by Respondent and that after the Charge, had been filed and about two weeks before the Hearing, Rego, at the request of the bargaining unit workers prepared Petitions for their signature to the effect that they did not want the Union to represent them. (123, 124-126, 130) Rego, on his own initiative, circulated the Petitions and obtained signatures of former Sterlingwale employees on R1 and new Fall River Dyeing and Finishing employees on R2. (128) These Petitions were left by Rego on Chace's desk. (127) The ALJ refused to admit R1 or R2, but allowed both to accompany the record as an offer of proof. (140) Respondent's Exhibit 1 contains the signatures of 53 employees who have stated that they do not wish to be represented by the Union. Respondent's Exhibit 2 contains the signatures of 36 employees who state that they do not wish to be represented by the Union. A total of 89 out of approximately 106-109 employees (167) have expressed their desire not to be represented by the Union. Although the ALJ correctly ruled

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9 The transcript contained an error in pagination with two pages bearing number 170.

that the Petitions were not evidence of a good faith doubt since they were made after the employers rejected the Union's demand for recognition,[10] the Petitions and the offer of proof are evidence that should be taken into account by the Board in balancing the interests of the employees, the Union and the Respondent in a successorship case.

QUESTIONS INVOLVED AND TO BE ARGUED

1. WAS THERE A SUBSTANTIAL CONTINUITY OF THE EMPLOYING ENTERPRISE BETWEEN STERLINGWALE AND RESPONDENT SUCH AS TO MAKE RESPONDENT A SUCCESSOR TO STERLINGWALE?

2. WHAT IS THE EFFECT OF THE SEVEN MONTH HIATUS IN OPERATIONS BETWEEN THE CLOSURE OF STERLINGWALE AND THE COMMENCEMENT OF OPERATIONS OF RESPONDENT ON THE QUESTION OF SUCCESSORSHIP AND ON THE QUESTION OF THE BARGAINING OBLIGATION IF ANY OF RESPONDENT?

3. IF RESPONDENT IS CONSIDERED TO BE A SUCCESSOR TO STERLINGWALE, AT WHAT POINT OF TIME IS THE MEASUREMENT TO BE MADE FOR MEASURING THE PERCENTAGE OF FORMER EMPLOYEES OF STERLINGWALE IN THE EMPLOY OF RESPONDENT?

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10 The record shows that the Union demanded recognition on October 19, 1982 (GC15) and the request was denied by letter dated October 21, 1982. (GC16)

ARGUMENT

1. WAS THERE A SUBSTANTIAL CONTINUITY OF THE EMPLOYING ENTERPRISE BETWEEN STERLINGWALE AND RESPONDENT SUCH AS TO MAKE RESPONDENT A SUCCESSOR TO STERLINGWALE?

The accepted test for determining successorship is whether there has been a substantial continuity in the employing enterprise. In reaching the determination, several factors are generally used. Among these factors are (1) business operations, (2) plant, (3) workforce, (4) jobs and other working conditions, (5) supervisors, (6) machinery, equipment and methods of product and (7) product or service. All of the foregoing factors have been specified as relied on by the ALJ in his Decision (Decision p. 2). The ALJ has also considered as a factor the continuity of customers. It is respectfully submitted that the ALJ has used the right test but has misapplied same to the facts and totality of circumstances of this case, and that sufficient continuity does not exist to support a finding of successorship.

Leading Supreme Court cases and applicable Board Law has established that not one of the foregoing facts by itself is determinative of the question whether there has been a substantial continuity in the employing enterprise. The ALJ in his opinion has not made specific findings with regard to the several factors which he acknowledges that he should conisder. His statement at p. 3 of his Decision that, "On these bases I conclude that respondent was a successor to Sterlingwale", does not identify with specificity

the conclusions that he has reached with regard to the varying factors.[11]

The ALJ states that Respondent retained most of the same job classifications and acknowledges that Respondent has no retail stores and fewer inspectors of fabric. (Decision p. 3) The ALJ has not considered the facts concerning working conditions. One reason for this is that there was very little evidence on the subject at the Hearing. What little evidence there was, points to a dissimiliarty in working conditions, not referred to or commented on by the AJL. The greatest disparity in working conditions has to do with the shifts. The testimony at the Hearing established that Respondent operates two 10 hour shifts. The unrefuted testimony at the Hearing was that Sterlingwale operated three shifts. The number of hours of the three shifts was not established but it is logical to assume that the three shifts were each of 8 hours duration. Apart from supervisor, as part of the working conditions, the record is otherwise barren. The expired collective bargaining agreement with the Union, which expired in April of 1982, after which no production was taking place at Sterlingwale, obviously has not been applied to the new workers. It is difficult to understand how the ALJ could have reached his conclusions, without taking into consideration any similarities or dissimilarities of working conditions.

On the subject of supervision, the ALJ states that supervision is the same, (Decision p. 3) basing this statement on the testimony of employee Rego, who stated that, "as far as I am concerned, it is the same supervisors, the same peo-

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[11] The ALJ mentions that Respondent uses the same production building with the same machinery as Sterlingwale did. (Decision p. 3) This is not entirely correct as the records indicate that now all production takes place in the Red Building. When Sterlingwale operated its business, some production took place in the Green Building (167)

ple." (115) The ALJ has overlooked, or at least not mentioned the testimony of Herbert Chace. Chace was the former Vice President of Sterlingwale (149) and in a much better position to testify with regard to supervision than was Rego, an ordinary production worker. Chace testified (156) that Sterlingwale employed approximately 18 supervisors at the time of its demise. Chace, who was rehired by Respondent and is Vice President, further testified that Respondent employs 12 supervisors and that it has no plans for any additional foremen (156) and that of the 12 supervisors four of them were not formerly employed as supervisors by Sterlingwale. (166) Equally as important, Chace testified that the plant was formerly supervised under Sterlingwale by Alfred Canuel who was Plant Manager (191) and that at that time, Chace was basically involved with sales. (191) At the present time, Respondent operates its business with Chace running the Plant and Labor Relations. (190-191)

The ALJ correctly states at page 3 of his Decision that Respondent did not start a new service or product line. He does not mention however, that Respondent eliminated an entire business, which Ansin testified amounted to between 60-70 percent of its volume, that being the business of converting. The record shows that the business of converting entails essentially similar physical operations on the part of the work force but it is essentially a different business than finishing which does not require the capital necessary to purchase fabrics or the need for a sales force to sell them.

The ALJ considered continuity of customers as a factor in determining continuity of the employing industry and found that a substantial part of Respondent's business is "linked" with Sterlingwale. (Decision p. 3) As has been previously noted in the Statement of the Case, this

conclusion rests on very shaky grounds and not on a firm factual basis. As previously noted, the key document, GC 10 and the testimony of the witnesses does not establish when, in the 30 year history of Sterlingwale the customers now served by Respondent, and appearing on GC 10 were the customers of Sterlingwale. There is no basis or validity for any inference bridging the gap of this failure of connection. Nevertheless, the ALJ found that Respondent's business is "linked" with Sterlingwale, (Decision p.3) because, in dollar volume, one-half of the current customers of Sterlingwale. It has been previously pointed out in the Statement of the Case, that arithmetically, 51 percent of Respondent's business was derived from the customers whose names are underlined on GC 10 but that one of the major customers is Respondent itself in the form of Marcamy Sales which is also owned by the same Art Friedman who owns the Respondent. If its sales are not considered, the percentage drops to 33 percent.

What has been utterly neglected by the ALJ in making his analysis with regard to sales, is the difference in concept with regard to finishing work between Respondent and Sterlingwale. Finishing work is the sole business of Respondent. Its purpose is to make a profit as a finisher. Sterlingwale, however, whose business was a mix of converting and finishing, used finishing work for a different purpose. It took on unprofitable finishing work to provide 12 full months of employment for its employees (60) and also to help defray fixed costs. (88) Ansin's testimony was that Sterlingwale could not make a profit on finishing work and that even if he went through bankruptcy, a study he caused to be made projected that a bank-

ruptcy court would not allow Sterlingwale to continue in the finishing business.

It was grossly unfair for the ALJ to ignore this basic difference with regard to finishing work and to make a finding that "a substantial part of Respondent's business is linked with Sterlingwale." (Opinion p.3) If such was the case, then Respondent can look forward to a slow death and an ultimate demise as befell Sterlingwale.

In considering the business operations of Respondent in comparison with those of Sterlingwale's Respondent argues that there was a difference in the nature and identity of the enterprise. Based on the facts previously set forth, the ALJ disagreed. (Decision p. 2) He found that:

> "The fact that respondent does something different before and after the production process is completed does not result in any essential difference. The enterprise is not identical, but it is similar."

It is respectfully submitted that the ALJ has taken too narrow a view of the business operations as a factor in the overriding question of whether there is a substantial continuity in the employing enterprise. The fact that the product produced is the same—that is finished fabric either for sale by a converter, or for shipment to its owner, or his consignee, does not constitute the test. Thus, in NLRB v. *Alamo White Truck Service* 273 F. 2d 238 (US CA 5th Cir 1958), 45 LRRM 2330, the Court held that:

> "The difference in the nature of the business and in the functions is of material importance in determining the employee-employer relationship."

In that case, the Court held that the Board had erred in finding an employer to a successor and required to bargain

with a certified Union where the employer had bought the inventory and equipment of a discontinued retail branch of an interstate truck manufacturer to operate an independent truck sales and service business as a local operation. In that case, the business was still selling trucks. The Court pointed out that there was substantial difference between the policies and operations of the large nationwide organization and the small local business and the Court concluded that, "the child bore no resemblance to its parent". The significance of this case is that the business of both the predecessor and the successor was trucks. *Alamo* operated primarily as a service operation, while it still sold trucks, on a local basis. The product is not however, the determining factor. What must be considered really is the nature of the business, not only from the point of view of an employee operating the machinery but from the point of view of the employer itself. The ALJ has not taken this into account in his analysis.

There is no fixed definition of "successor".[12]

Although "majority" status" in the workforce is a prime criteria, the Board has found the continuity of the employing enterprise destroyed where the continuity, other than that of the workforce consisted primarily of the acquisition of a portion of the customers of a moribund company solicited in competition with other companies, *Co-Op Trucking*, 209 NLRB 829, 86 LRRM 1242 (1974); *Lincoln Private Police, Inc.*, 189 NLRB 717, 76 LRRM 1727 (19/1), and, while there is no single factor which will prevent a finding of successorship, where combinations of:

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[12] Howard Johnson Co., v. Detroit Joint Board, etc 417 U.S. 249, 262 n. 9 86 LRRM 2449 (1974).

1. A long hiatus in the resumption of operations;

2. A difference of location of the resumed operation;

3. A changeover of the supervisory hierarchy;

4. The absence of a carry-over of customers or markets supplied;

5. A difference in the scale or the operations, and the products produced, and in the methods of production, have been present, a "successorship" has not been found. *Radiant Fashions, Inc.*, 202 NLRB 938, 82 LRRM 1742 (1973); *Galis Equipment Co.*, 194 NLRB 799, 79 LRRM 1073 (1972); *Georgetown Stainless Manufacturing Corp.*, 198 NLRB 234, 80 LRRM 1615 (1972); *Cagle's Inc.*, 218 NLRB 603, 89 LRRM 1337 (1975); *Atlantic Technical Services Corp.*, 202 NLRB 169, 82 LRRM 1467 (1973) Enf. 498 F.2d 680, 86 LRRM 2182 (CA DC, 1974); *Lincoln Private Police, Supra, Co-Op Trucking Co., Supra.*

The presence or absence of the foregoing criteria reflect on the desires of the employees for continuing representation.

In the case at bar we find a major change in the supervisory hierarchy. The former Plant Manager who was responsible for day to day operations of the Plant and labor relations has been terminated by Sterlingwale and not rehired by Respondent. In his place, Chace performs those functions. In addition, overall supervision has been reduced from 18 to 12, and 4 of the 12 supervisors were not employed by Sterlingwale.[13]

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[13] It is to be noted that the old management presided over an operation which had as a major aim the retention of all employees jobs and taking in non-profitable business it required. Respondent's objectives are otherwise. It purchased certain assets of the moribund business to make a profit as a finisher.

With regard to carry over of market, there has been a complete change. The market is no longer the sale of goods owned by the processor to the garment trade. Respondent purchases no goods for its own account and accordingly, the "suppliers" are different. The market is now processing the goods of others for a commission and no sale by Respondent.

With regard to customers, excluding Marcamy Sales, which is wholly owned by Arthur Friedman, the owner of Respondent, about one-third of Sterlingwale's finishing customers are serviced by Respondent. Since there was a seven month hiatus in production they could not have been carried over or transferred and there is no evidence in the record, or claim that there was a sale or transfer of customers. Respondent did not even acquire the well-known trade name of Sterlingwale.

Certainly, the scale of operations has changed substantially. Whereas Sterlingwale operated three shifts a day, presumably of 8 hours each, Respondent operates two 10 hour shifts. Additionally, while Sterlingwale was a 30 million dollar a year operation, if Respondent had accounts receivable of $145,000.00 in a month, it would do $1,740,000.00 business per year on a projected basis. [14]

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[14] Decision p.4, the ALJ found accounts receivable from previous months to be $145,001.38 as of November 1982. The AJL bases this finding on TR 188. The witness testified however, that he did not know what the figure meant or stood for. (189) It is clear however from Ansin's testimony that a business based substantially on converting as contrasted with finishing would result in much larger dollar figures as the fabric would be sold rather than simply worked on for a commission.

The Sterlingwale employees had no reasonable basis for any expectation that their employment would be resumed by anyone at the same location. They were indefinitely laid off in February 1982. Ansin then began an immediate liquidation which resulted in a late summer sale by Beacon Liquidators of the remaining assets of Sterlingwale other than real estate and machinery. Real estate and machinery were foreclosed and sold to Respondent in August 1982. Prior to that, in July, Ansin told the Union's representative, Lenehan, that efforts to resurrect the business had failed. Clearly the hiatus from mid-February 1982 until Respondent placed an ad for employees in the local newspaper about mid-September 1982 negated any reasonable belief that any former Sterlingwale employee might have had that their employment might be resumed by Sterlingwale.

The former employees of Sterlingwale, when they were laid off, lost their earned vacation pay, (46) and learned that their insurance premiums had not been paid for months by their former employer. (36) Their Union had failed to get them their vacation pay or remedy the insurance problem and the employees held the Union responsible. As a result of these failures, the employees, old and new, signed R1 and R2, sponsored by no one other than the Secretary of the Union. While these petitions may not be used by the Respondent, to show a good faith doubt as to continuing representative status of the Union because they were delivered to Respondent after the Respondent refused recognition, the petitions signed by 89 out of 106-109 production employees should have been considered as important evi-

dence that the employees of Respondent did not and do not desire to be represented by the Union.

THE EFFECT OF THE HIATUS ON THE QUESTION OF SUCCESSORSHIP

The Board takes into consideration, in determining the question of "successorship", the existence of a hiatus between the cessation of Sterlingwale's operations and the commencement of operations by Respondent. The ALJ noted the seven month hiatus in this case in commenting that he found Respondent to be a successor despite the hiatus. (Decision p. 3 ff4) The ALJ relied on the Board's decision in *Aircraft Magnesium, A Division of Grico Corp.*, 265 NLRB No. 172 (1983) (slip opinion) and *United Maintenance and Manufacturing Co., Inc.*, 214 NLRB, 529 (1974) 87 LRRM 1469, for the proposition that, generally, a hiatus is only material in determining successorship status when there have been other substantial changes in the enterprise. We have already demonstrated that substantial changes in the employing enterprise have occurred in this case, which have been overlooked by the ALJ, or which have not been accorded proper weight. We also submit that the ALJ has erred in ignoring the significance of a hiatus on the employees expectation of rehire. The Board held in *Aircraft Magnesium Supra*, at p. 8,

> "Further, the significance of a hiatus to successorship status is its effect on the employees' expectations of rehire".

That expectation bears on the question whether the Union should be accorded repesentative status by the Board as one of the obligations of successorship. The Supreme Court has said that the determination of "successorship"

does not lead to a fixed conclusion about the extent to which which successorship obligations are applicable. *Howard Johnson Company v. Detroit Local Joint Executive Board, etc., Supra.*

Aircraft Magnesium is distinguishable factually from this case. There, after a bankruptcy, and a layoff of bargaining unit employees, there was a hiatus of operations of less than one month during which, *Aircraft Magnesium* purchased not only the physical assets of its predecessor but its books and records including customers lists, invoices and operating permits. There was a stipulation that a majority of the customers and suppliers remained the same. Especially significant in *Aircraft Magnesium* was its expressed interest in rehiring all of the predecessors employees the day after the purchase was completed and the subsequent expeditious hiring action carrying out that intention.

Those factors indicate the desire of the employer to in reality continue the predecessor's business, an intent wholly absent from the case at bar. Furthermore, the record shows here no intent to hire all former employees as the Respondent ran a newspaper ad for employees when obviously it could have found out where the Sterlingwale employees were and contacted and hired them all.

United Maintenance and Manufacturing Co., Supra, is also factually distinguishable from the facts of this case. There, the hiatus of approximately 4½ months resulted from a strike in which the vast majority of employees participated, not from the employer's decision to cease operations, and the Board found that operations under the new

employer continued substantially unchanged, *United Maintenance, Supra* at p.532.

The seven month hiatus, coupled with other factors such as the Petitions (R1 and R2) from both a majority of old and new employees that they did not want to be represented by the Union should have been considered by the ALJ as an important factor in this case, but were not.

RESPONDENT SHOULD NOT HAVE BEEN ORDERED TO BARGAIN WITH THE UNION BECAUSE RESPONDENT DID NOT EMPLOY A MAJORITY OF STERLINGWALE'S FORMER EMPLOYEES AT THE APPROPRIATE MEASURING TIME

As previously stated in these Exceptions, a finding of "successorship" does not automatically lead to a bargaining order. *Howard Johnson v. Joint Board, Supra.*

The ALJ claims to have relied on the Board's decision in *Aircraft Magnesium, Supra* for guidance in deciding the measuring time frame for determining what percentage of Respondent's employees were former employees of Sterlingwale. If the time frame is prior to the week ending March 24, 1983, a majority of Respondent's employees were former Sterlingwale employees. Beginning the week ending March 24, 1983 the majority of Respondent's employees were *not* formerly employees of Sterlingwale. (Decision p. 3-4).

Aircraft Magnesium laid down a two part test. The measuring period is (1) when a bargaining demand has been made, and (2) a representative complement of an em-

ployees work force is on the job.[15] All agree here, that the bargaining demand was made by letter dated October 19, 1982.

Respondent argued that a mid-April, 1983 date, when it had two full shifts fully working was the inquiry point. The ALJ rejected this proposition stating that he presumed it was pressed because Sterlingwale employees became a minority of the unit about March 24, 1983. (Decision p. 3) The ALJ has overlooked evidence in the record supporting Respondent's position and has substituted a presumption in its place. The *record* shows that Chace testified that it was Respondent's business plan to operate with a two *shift* operation. There was good business reason for this as explained by Chace. He testified that once production started to gear up, a second shift was *required* to work on and complete the wet goods. (186) This was an essential business judgment of Respondent that it was entitled to make. It has been completely disregarded by the ALJ who has substituted a bit of sarcasm and a presumption for the Respondent's business judgment.

At the very least, if a "representative complement" test is to be applied, it should not have been applied to the first shift alone, but to the first and second shifts together. The second shift commenced in January 1983. It reached full capacity in mid-April. The measuring period should

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[15] The ALJ seems to have utilized a different standard than representative complement. His analysis (Decision p. 3 - 4) deals with a representative *"capacity"* which he apparently equates to a representative *"complement"*. There is no evidence in the record that the two terms are the same. The ALJ found that Respondent reached representative complement in mid-January 1983 when the plant was running one shift at full capacity. Neither the ALJ's finding or reasoning should be allowed to stand.

have been sometime between January and mid-April. Until this is determined, it cannot be said, on the basis of the ALJ's decision and the record, that a majority of Respondent's former employees were employed by Respondent and that a bargaining order is warranted.

The Board has acknowledged that there are difficult problems of interpretation when the new employers complement is initially composed mainly of the predecessors employees due to an unusual and drastic shrinkage from the units normal size but the eventual full complement proves to consist of a majority of new hires. Such is the case here if the normal size of the unit is viewed as two full shifts amounting to approximately 106-109 unit employees. See *Garden Buena Ventura Inc.*, 242 NLRB 595, 101 LRRM 1248 (1979), and *Galis Equipment Co., Supra.* The "full complement date" depends on the particular facts. *Pre-Engineered Building Products Inc.*, 603 F. 2d 134, 136, (CA 10, 1979) 101 LRRM 3021, *Pacific Hide and Fur Depot, Inc., v. NLRB*, 553 F. 2d 609, 95 LRRM 2467 (CA 9, 1977).

In *Pre-Engineered Building Products Inc., Supra,* the Court distinguished between business taken over in full operation and a successor faced with a collapsed business. The Court held at 101 LRRM 3023 that:

> "When a predecessor business has been taken over in full operation, the issue here presented is not likely to arise. On the other hand, when, as in this case, the predecessor business has essentially collapsed at the time of the takeover and a successor of necessity must rebuild both production demand and work force, it is incumbent upon the NLRB to examine the available evidence to determine when the successor employer has obtained a full complement of employees."

As this Board is well aware, some Courts do not agree with the Board regarding the "representative complement" test. The controvery that exists is fueled by the dictum in *Burns* to the effect that,

> "In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a Union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act . . .". *Burns, Supra,* p. 294, note 9.

Thus, the Ninth Circuit in *Pacific Hide and Fur Depot Inc. v. NLRB, Supra,* and the Tenth Circuit, in *Pre-Engineered Building Products Inc., Supra,* view the critical measuring date as the "full complement" date. Thereafter, the Board, in *Hudson River Aggregates, Inc.,* 246 NLRB 192, 102 LRRM 1524 (1979) appeared to modify its views so as to require a "substantial majority" in a "representative complement". This seems to be the Board's present view as indicated by reliance on *Hudson River Aggregates Inc., supra,* in *Aircraft Magnesium, supra.*

It is clear that the Board's present position remains at variance with the Ninth and Tenth Circuits which require a measurement based on the *Burns*[16] concept of a "full complement" in a "successorship" situation and not a "representative complement" which is derived from earlier Board Law dealing with representation questions arising from expanding units, not involving the "successorship doctrine". It is suggested that the present factual situation and the underlying requirements to balance the interests of

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16 *NLRB v. Burns International Detective Agency* 406 U.S. 272, 80 LRRM 2225 (1972).

the old employees, the new employees, and the Respondent employer warrants a new and further look at present Board policy in a case, such as this which is unmarred by collateral unfair labor practices such as were present in *Hudson River Aggregates.*[17]

The Board also found that *Hudson River Aggregates* began full scale operations on the "representative complement" date, taking into account the nature of that employer's operations. In the case at bar full scale operations means the second shift which is required to complete the work commenced by the first shift. Even if that test is to be applied, the measuring date in the case would be not when the first shift was running fully but minimally when the second shift was fully operational, a factor not considered by the ALJ.

Thus, in summary, it appears that the ALJ may have applied a representative "capacity" date, in contravention of the Board's representative "complement" date. Regardless of whether he has, it is urged that in view of the facts of this case, the measurement date should be mid-April 1983 when the second shift was filled out. At that time, a majority of Respondent's employees were not former employees of Sterlingwale.

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17 In *Hudson River Aggregates, Supra,* at p. 198 the Board fixed the date in large measure because of the effect of the employers unfair labor practices on the number of employees.

CONCLUSION

For all of the reasons set forth herein, the Board should not adopt the ALJ's Decision and should dismiss the Charges against Respondent.

Dated: New York, New York
March 14, 1984

Respectfully submitted,

Ira Drogin
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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 27, 1986

Mr. Ira Drogin
440 Park Avenue South
New York, NY 10016

Re: Fall River Dyeing & Finishing Corp.,
v. National Labor Relations Board
No. 85-1208

Dear Mr. Drogin:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.,
Clerk

NATIONAL LABOR RELATIONS BOARD

Case No. 1-CA-20, 391

In the Matter of:

FALL RIVER DYEING & FINISHING CORP.

Pages: 1-197
Place: Boston, Massachusetts
Date: May 2, 1983

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BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Region One

Case No. 1-CA-20,391

In the Matter of:

FALL RIVER DYEING & FINISHING CORP.

and

UNITED TEXTILE WORKERS OF AMERICA, AFL-CIO, LOCAL 292

Hearing Room
99 High Street
Boston, Massachusetts

Monday,
May 2, 1983

The matter in the above-entitled matter was convened pursuant to notice, at 11:05 a.m.

BEFORE: BURTON S. KOLKO
Administrative Law Judge

APPEARANCES:

On Behalf of General Counsel:

Robert Redbord, Esq.
Counsel for General Counsel
National Labor Relations Board
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Boston, Massachusetts 02110

On behalf of the Employer:

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On behalf of Union:

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207 Union Avenue
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Witnesses	*Direct*	*Cross*	*Redirect*	*Recross*
James Lenehan	15	28	50	—
Leonard Ansin	51	76	107	—
Norman Rego (V.D.: 129)	110	118	145	—
Herbert Chace	148	177	—	—

Exhibits	*For Identification*	*In Evidence*
General Counsel's:		
No. 1(a)-(f)	6	6
Nos. 2 thru 7	9	10
No. 8	9	11
No. 9	9	13
No. 10	9	14
Nos. 11, 12, 13	16	19
No. 14	16	28
Nos. 15 & 16	26	27
No. 17	68	68
No. 18	69	69
No. 19	187	190

(p. 4) EXHIBITS FOR THE RESPONDENT:

	Identified	*Received*
No. 1	128	(rejected - 141)
No. 2	128	(rejected - 141)

(p. 5) PROCEEDINGS

(11:05 a.m.)

Judge Kolko: On the record.

Good morning, everyone.

This is in the matter of Fall River Dyeing & Finishing Corp., Case No. 1-CA-20,391.

Who is appearing for the General Counsel?

Mr. Redbord: Robert P. Redbord, 99 High Street, Boston, Massachusetts.

Judge Kolko: And for the union? Anybody making a separate appearance?

Mr. Lenehan: James Lenehan, United Textile Workers of America.

Judge Kolko: And for the Respondent?

Mr. Clarkin: My name is James Clarkin. I'm an attorney with an office at 257 North Main Street, Fall River. I'm accompanied by Mr. Marzilli, 201 Wayland Avenue, Providence, Rhode Island, who's also filed an appearance.

Judge Kolko: Any other appearances?

(No response.)

Judge Kolko: Okay, Mr. Redbord, you may proceed.

Mr. Redbord: Thank you, Your Honor.

At this time, I would offer into evidence GC-1(a) through (f), the formal papers, (f) being an index of the entire exhibit.

(p. 6) The exhibit has already been shown to Counsel for the other side.

Judge Kolko: Any objection?

Mr. Clarkin: No objection, Your Honor.

Judge Kolko: It is received.

(The documents above-referred to were marked General Counsel's Exhibit No. 1(a) thru (f), inclusive, for identification, and was received in evidence.)

Judge Kolko: Mr. Redbord, have you got an appearance sheet for me? If not now, at some point.

Thank you.

Go ahead.

Mr. Redbord: At this time, Your Honor, in pre-hearing discussion the parties entered into some stipulations which I'd like to run down at this time.

Judge Kolko: Go ahead.

Mr. Redbord: Starting with the complaint as I understand it, first the parties are prepared to stipulate that Respondent is and has been engaged in commerce within the meaning of the Act. That is, stipulate as to paragraph five of the complaint. And I would so propose that stipulation now.

Judge Kolko: Any objection?

(p. 7) Mr. Clarkin: No; that's stipulated to.

Judge Kolko: Very well.

Mr. Redbord: Next, Your Honor, the parties would stipulate that the union in this case is a labor organization

within the meaning of 2.5 of the Act, which would be paragraph six of the complaint.

Judge Kolko: Mr. Clarkin?

Mr. Clarkin: Sitpulated.

Judge Kolko: Very well.

Mr. Redbord: As far as paragraph 8(a) of the complaint is concerned, 8(a) concerns the status of Sterlingwale Corporation, which is the predecessor. General Counsel would wish to amend out of 8(a) the word, printing, in the last sentence of that paragraph. And with that deletion, would propose a stipulation as to paragraph 8(a).

Mr. Clarkin: It's agreeable, Your Honor.

Judge Kolko: Okay. So the words, and printing, in the last line of 8(a) are out.

Okay, keep going.

Mr. Redbord: Okay. Next, General Counsel would propose a stipulation that paragraph 10(a) and 10(b) are as stated. I guess it would more be — this might all be more in the nature of an amendment, an amended answer. But I think a stipulation would amount to the same thing. So I propose a stipulation as to the truth of the matter set forth in 10(a) (p. 8) and 10(b), which are the unit — 10(a) at Sterlingwale — and 10(b) at Fall River Dye.

Mr. Clarkin: That's agreed. That's an appropriate—

Judge Kolko: Okay.

Mr. Redbord: And I think that would be the stipulations regarding the complaint.

At this point, we have some further stipulations of fact. Just so Your Honor knows where we're coming from here, obviously the General Counsel has alleged a successorship in this case. And we'd like to stipulate as to certain facts regarding how the successor — whether Your Honor will eventually find it to be a legal successor or not — how Respondent came to occupy the premises and the equipment that it is using and so on.

To the extent these stipulations will begin with Fall River Dye taking an active part, event prior to that will be explained through testimony.

First — well, perhaps we should have these marked. Can we go off the record to mark these?

Judge Kolko: Okay, let's go off the record.

(Discussion off the record.)

Judge Kolko: On the record.

(p. 9) (The documents above-referred to were marked General Counsel's Exhibits Nos. 2 thru 10, inclusive, for identification.)

Mr. Redbord: Your Honor, at this time, I would offer the following documents into evidence by way of proposed stipulation, in order to outline the chronology by which the Respondent came to be what it is now.

First, GC-2, which is an agreement made August 30 between Marcamy Sales Corporation, Lila M. Ansin and Massachusetts Capital Resource Company.

Second, articles of incorporation of Fall River Dyeing as GC-3.

Third, as GC-4, an assignment from Marcamy Sales Corporation to Fall River Dyeing of its right, title and interest in the forestated August 30 agreement.

As GC-5, an assignment from Fall River Dyeing to 108 Stevens Street of the rights pursuant to that same agreement.

GC-6, a deed from Lila Ansin to 108 Stevens Street Realty Corp.

As GC-7, a list of items from Beacon Liquidators and Appraisers which indicates items purchased at an auction by Beacon Liquidators, purchased by Fall River Dyeing.

I would offer those at this time, Your Honor.

Judge Kolko: Any objections?

(p. 10) Mr. Clarkin: No objection, Your Honor.

Judge Kolko: Received.

(The documents above-referred to, heretofore marked General Counsel's Exhibits Nos. 2 thru 7, inclusive, for identification, were received in evidence.)

Mr. Redbord: Next, Your Honor, I propose receipt by stipulation of GC-8, which is a five page document with the list of current and past Fall River Dyeing & Finishing employees.

I would note for the record that this document indicates in the far left hand column whether or not these people were former Sterlingwale employees.

The document also contains a few changes that were made this morning, which I would like to point out so it's clear for the record:

First of all, the very first name on the first page—Carlos Carreiro—forgive me if I mispronounce the names

—is listed as a former Sterlingwale employee. But it is noted that he was a supervisor when he was at Sterlingwale.

There are certain individuals whose—a line is drawn through their name. They are not to be included in any calculation.

At the bottom of page four, added in ink, is a (p. 11) Cheryl Platt; she's to be included as well.

Moreover, we would clarify this document that—by indicating that, in discussions with Respondent and General Counsel, it has been understood that the employees who would be in the unit which has now been stipulated to be appropriate are listed on page one, page two, page three and page four—but page four only up through the second individual, William Sears. All the names below that, with the exception of Cheryl Platt who was recently added, would not be included in the unit as now stipulated to be appropriate and are employees of the Employer in some other capacity.

And in particular, I would note that at the—near the bottom of page four, beginning with Robert Perrier and ending with Fransisco Cabral, these would be stipulated supervisors. Also Jose Sousa, listed at the bottom, would be a stipulated supervisor.

Judge Kolko: Mr. Clarkin, any objection?

Mr. Clarkin: No, Your Honor.

Judge Kolko: All right, 8 as identified is now received.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 8 for identification, was received in evidence.)

Mr. Redbord: If I could just note for the record, (p. 12) Your Honor, the last page of 8 is a list of employees who were hired and then left the Fall River Dying operation. And as far as that's concerned, that last page includes one Estelle Woodruff as an office person who would not be at any time, in the unit.

Next, Your Honor, we offer as GC-9—

Mr. Clarkin: Excuse me, Your Honor.

Before we dispose entirely of GC-8, I would just like to indicate, Your Honor, that in the far left hand column here—as General Counsel explained—the column is captioned, Former Sterlingwale. It's followed beneath, on each page, with yeses and nos.

I would simply like to indicate to Your Honor that there is no indication on this document as to when each of those respective employees, in the case of yeses, was, in fact, last employed by Sterlingwale.

Judge Kolko: Okay.

Mr. Redbord: Just to finish that off, Your Honor, there will be payroll records from Sterlingwale introduced through a witness which will cover 1981 and 1982, such that if Your Honor feels it necessary to calculate that, it will be possible to do so.

Next we would offer by way of stipulation GC-9, which is a list with a total on the front page of all machinery and equipment purchased by Fall River Dyeing after the agreements (p. 13) which have previously been in evidence—that is, the August 30 agreement and the assignments and so on thereto—up until the end of April this year, 1983.

Mr. Clarkin: No objection, Judge.

Judge Kolko: Received.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 9 for identification, was received in evidence.)

Mr. Redbord: And lastly—by way of document, for the moment—we'd offer GC-10. GC-10 is a list of customers of Fall River Dyeing. GC-10 has Xs appearing in the left hand margin next to the names of some of those customers; those Xs are to be ignored, Your Honor.

Rather, if a customer who appears on this was also a customer of Sterlingwale, the name of that company is underlined.

And I would ask that this be received with the understanding that there are one or two customers which—there may be a dispute as to whether or not they were customers of Sterlingwale. In that matter, this document may be modified by evidence.

Mr. Clarkin: No objection.

Judge Kolko: Reveived.

(p. 14) (The document above-referred to, heretofore marked General Counsel's Exhibit No. 10 for identification, was received in evidence.)

Mr. Redbord: Lastly, before we begin testimony, the chronology that we offered earlier was missing one piece in puzzle, if you will. And I think we can stipulate to it at this time, and we are hoping that the document supporting this will come in. But in any case, we'd propose a stipulation that on or about September 17, 1982, there was a bill of sale from Massachusetts Capital Resource Company —which was a secured party under a security agreement with Sterlingwale Corporation—to Fall River Dyeing & Finishing Corp. for the—in which the Mass. Capital Resource Company granted, sold, transferred and deeded to Fall River the right, title and interest as secured party in all the machinery, equipment, furniture and fixtures located on the premises formerly occupied by Sterlingwale. And including in that bill of sale the inventory that is described in the schedule to the August 30 agreement.

Mr. Clarkin: I think that the stipulation should indicate that Mass. Capital Resources was, in fact, in possession of that goods that were transferred.

Mr. Redbord: We will have that through testimony.

Mr. Clarkin: In any event, to save some time, that (p. 15) particular document is on its way up here via Federal Express. It was sent Friday; we'll have it in before the end of the case.

Judge Kolko: All right. We will not count that as an actual stipulation; we'll wait for the document to arrive.

Mr. Redbord: With that, I think that—I think that sums up the preliminary matters, unless Mr. Clarkin has anything I've neglected.

Mr. Clarkin: No. Other than I disagree with your characterization of this as a puzzle. It's simple.

Mr. Redbord: It's simple to some.

Shall I proceed, Your Honor?

Judge Kolko: You may.

Mr. Redbord: Thank you.

At this time, I call Mr. Lenehan.

Whereupon,

JAMES LENEHAN

Was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Redbord:

Q. Could you please identify yourself for the record, sir?

A. James Lenehan, International Representative, United Textile Workers of America.

Q. And how long have you been an international representative?

(p. 16) A. Ten years.

Q. Have you ever heard of a place called Sterlingwale Corporation?

A. Yes.

Q. Are you aware if the union has ever represented employees at Sterlingwale?

A. Yes, we have.

Q. Are you aware how long the union has been representing employees at Sterlingwale?

A. Just short of 30 years.

Q. And when you say just short of 30 years—

A. I'd say 29 years. 1953.

Mr. Redbord: Perhaps we could go off the record, Your Honor, and mark a few exhibits.

Judge Kolko: Okay, off the record.

(Discussion of the record.)

Judge Kolko: On the record.

(The documents above-referred to were marked General Counsel's Exhibits Nos. 11 thru 14, inclusive, for identification.)

By Mr. Redbord:

Q. Mr. Lenehan, I show you what's been marked as GC-11. Do you recognize that?

A. Yes. This is a copy of the contract between the United (p. 17) Textile Workers and Sterlingwale.

Q. And I'd like to show you what's been marked as GC-12 and ask you if you can identify that for us.

A. Yes, I recall this communication when the name was changed from Sterling Pile Fabrics to Sterlingwale Corporation.

Q. What's the date on that letter?

A. June 13, 1979.

Q. I'd like to show you what's marked as GC-13 and ask you if you can recognize that.

A. Yes. This is an amendment to the agreement, whereby the union agreed to extend the contract without any wage increases or anything of that sort because of the financial condition of the company.

Q. When was this agreement entered into?

A. This was October, 1980.

Q. Was there any expiration of this amendment?

A. It—there was no expiration—

Mr. Clarkin: I'm going to object, Your Honor. I think the document will speak for itself.

Judge Kolko: I'll sustain the objection.

Mr. Redbord: Well, Your Honor, the question is not necessarily directed to the document. It's possible an extension could have been made orally.

Judge Kolko: I'll take that as a separate question. (p. 18) But so long as we're dealing with this document, I want the record to be very clear as to what the document says and doesn't say.

Mr. Redbord: If I may ask it this way, Your Honor.

By Mr. Redbord:

Q. Does the document reflect any expiration date of the amendment?

Mr. Clarkin: I'm going to object again. Again, the document speaks for itself, so he doesn't have to interpret it.

Judge Kolko: I'll sustain the objection. We'll find it in the document, whatever it says.

By Mr. Redbord:

Q. Very well, I'd like to show you now what's been marked as GC-14 and ask you if you recognize that.

A. This is a seniority list, by department, and the job classifications in the various departments.

Q. Can you tell us who prepared GC-14?

A. The company prepared it.

Q. And it indicates at the top, effective April 1, 1981, base rates will be increased. Is that pursuant to anything in particular?

A. Yes. That is in reference to a cost of living clause that's in the contract. And the—this indicates the wage increase, including three cents, because of the cost of (p. 19) living, effective April 1, 1981.

Mr. Redbord: Your Honor, at this time, would move for admission of all these exhibits identified by Mr. Lenehan, would which be GC-11 through 14.

Judge Kolko: Any objection?

Mr. Clarkin: I have no objection to GC-11, 12 and 13. I've got an objection to the introduction of GC-14; I don't think a proper foundation has been laid for the document.

Judge Kolko: I'll withhold ruling on GC-14, Mr. Clarkin, pending any further elaboration you want to give me. And GC-11, 12 and 13 are in.

(The documents above-referred to, heretofore marked General Counsel's exhibits Nos. 11, 12 & 13 for identification, were received in evidence.)

By Mr. Redbord:

Q. Mr. Lenehan, to your personal knowledge, did there ever come a time when Sterlingwale ceased to operate?

A. Yes.

Q. And do you recall when that was?

A. Well, my first knowledge of the plant termination of operation was on—I guess it would be Saturday, if I'm correct on the date, February 20. My wife indicated to me that she heard on television that a plant in Fall—

(p. 20) Mr. Clarkin: Your Honor, I object—

The Witness: —River, Massachusetts had closed.

Judge Kolko: I'll overrule the objection.

Mr. Clarkin: —and ask that it be stricken.

Judge Kolko: Go on, Mr. Lenehan.

The Witness: And then I further became aware of it by the announcement by Mr. Ansin, a copy of which was in the local newspaper in Fall River, which was February 20.

By Mr. Redbord:

Q. Now, as of the time that you learned that, could you tell us what, if anything, was the status of negotiations between the company and the union?

A. Well, with respect to the union and the company, the—according to the evidence you presented previously—the one that's in question, if I might bring that up—where the company and the union had agreed in 1980 to extend the contract and—because of the financial condition of the company.

We then notified the company and the Federal Mediation as required, sometime prior to October, in that vicinity, 1981. Because the stipulation said that the company and the union would be agreeable to meet and commence negotiations at that time. And also, if we came to

an agreement prior to the termination date of the contract, that the—both parties agreed that it would be whatever might be.

The results were we had, I believe, four or five (p. 21) meetings in that time, up until—I think the last meeting we had on December 23, which was not directly negotiations. But it was part of it in the sense that myself and the president of the union and the two representatives of the Blue Cross and a representative of the company sat down on the Blue Cross question. So that would have been the fifth meeting.

So we had four meetings on the contract, and the last meeting was to resolve the Blue Cross situation.

And at that point, the negotiations would be continued. That was December 23.

Q. Who was the negotiator or negotiators for Sterlingwale?

A. Mr. Paul Horvitz, the attorney, and Mr. Ansin, and Mr. Chace.

Q. After you learned of the—this ceasing of business, did you have any discussions with anyone from management about the ceasing of business?

Maybe if I explained it this way—the last day worked was February 12. The people were informed by word of mouth that the—they were indefinitely laid off February 12.

When that took place, the union and the company made an effort to make preparations for the people who were indefinately laid off, as to their hospital coverage and their life insurance. We both jointly participated in that effort.

Q. That effort, are you talking about bargaining (p. 22) negotiations?

A. No. I'm talking about being able to direct the people as to their coverage of hospitalization and life insurance, because of what was taking place. So that they could continue their coverage, in other words, while they were out. You know, this was the immediate problem of the union; that's our view. At that time, what do we do with these people? Are they covered? Are they not?

If I may elaborate on it, we later found out that the premiums had not been paid for the months of January and February. And then we also found out that the—the insurance had not been cancelled by the company—by Sterlingwale or by the insurance company. And we also found out the premiums that were necessary for those people to pay to continue their single and family coverage—I think the single was like $135 for three months—two months the company didn't pay. And for us to continue—we were in the month of March—then we had to pick it up. And I think it was four hundred, I think, and forty-one dollars for family coverage. And that included all employees of Sterlingwale, including Mr. Ansin and Mr. Chace and the union members and so forth and so on.

We did collect approximately $8000. It was paid to Massachusetts Mutual Insurance to cover that three month period.

(p. 23) Q. Now, I think I lost you for a second. After the date that you learned of the closing of the plant, on how many occasions did you meet with company representatives of Sterlingwale to discuss the effects of that closing?

A. The week—after the 12th of February, I was in the plant I believe that week about at least three times, trying to get information with respect to the coverage and so forth and so on.

Then, as I said, we pursued that because that was the immediate problem at that time, the well-being of our union members and everybody else, obviously, that was involved.

We were—I was in the plant numerous times, and the president of the union and some of our committee were in the plant, getting information as to communications going out—which, incidentally, the company was very cooperative and also Mr. Ansin was very cooperative. His office staff was available to us, in terms of sending letters out to the people, informing them what they had to do to continue their coverage, the premiums they had to pay and so forth and so on.

Q. Could you tell us when the last time was, that you recall, meeting with the company regarding the effects of the closing on the people?

A. Well, I—I—the best way I probably could answer that is, from the time that the plant closed right up to the time (p. 24) that the—just prior to the plant or the real estate or whatever being auctioned off, we had—I had been there periodically, had called on the phone; the president of the union had done likewise, various questions. Whether we could meet with the company; what their views were. I recall specifically—I think this was on July 12—myself and the president spoke to Mr. Ansin for about an hour, we were in there, discussing the problem. And we recognized that he was making every effort to—you know, somebody take over the plant and what have you. And he also indicated his concern about the—people's jobs, and also the community.

At that particular meeting, we—Mr. Ansin, we informed him that we had a contract, which he was aware of.

We also—I also suggested that, at that time, if there were people interested, we would appreciate it if he would make an effort to maybe arrange a meeting—

Mr. Clarkin: Objection.

The Witness: —with the management—

Mr. Clarkin: You know, I've been very patient. I think the three or four minutes of Mr. Lenehan's response has ceased to be responsive to the question.

Judge Kolko: I would tend to agree.

Let's have Mr. Redbord ask you more direct questions and we'll get specific responses, which might shorten this up here.

(p. 25) by Mr. Redbord:

Q. Well, I might just as well ask the witness to finish up the conversation. What else was said on July 12?

A. Well, on July 12, we suggested to Mr. Ansin that we were concerned about the plant operating, the peoples [sic] and the company, and that we thought it would be a good idea—if there was somebody interested—we could arrange a meeting. We'd sit down with the prospective buyers, if there were any at that time, which we were not positive of, other than rumours. And maybe we could work something out.

He agreed with us. He said he would do that, and he would get back to us, and we never heard from again.

Q. Did there ever come a time when you learned that someone else was operating at the Sterlingwale location?

A. Yes. I went to the recorder of deeds and I became aware of the transaction that took place in the city of Fall River at the plant.

Q. When are you speaking of? What's the time period, sir?

A. That was sometime around August, I believe, of 1982. That this transaction was taking place.

Q. Did there ever come a time when you had reason to believe that there was some sort of production going on at that location?

A. Yes. I was—I was informed by the president of the union and others that there was an ad put in the paper that (p. 26) they were going to hire help. And I also went and got a copy of the ad that was recorded, you know, as part of the library in Fall River.

Q. What time period are we talking now?

A. We're talking in September. I'm not sure of the exact date.

Mr. Redbord: May I have these marked?

(The documents above-referred to were marked General Counsel's Exhibit Nos. 15 & 16 for identification.)

By Mr. Redbord:

Q. Mr. Lenehan, at this time, I would like to show you what has been marked as GC-15 for identification and ask you if you can recognize that.

A. Yes. This is our communication to Mr. Herbert Chace.

Q. And I'd like to show you what's been marked as GC-16 and ask you if you can recognize that.

A. Yes. And this is an answer to that communication from Attorney Clarkin.

Q. Regarding GC-15, did you prepare that on or about the date indicated?

A. Yes.

Q. And regarding GC-16, did you receive that on or about the date indicated?

(p. 27) A. GC-16?

Q. Yes, the—

A. Oh, okay. Yes, that is correct. Yes.

Mr. Redbord. Thank you.

Your Honor, I would move for receipt of GC-15 and 16.

Mr. Clarkin: No objection, Your Honor.

Judge Kolko: Received.

(The documents above-referred to, heretofore marked General Counsel's Exhibits Nos. 15 & 16 for identification, were received in evidence.)

Mr. Redbord: May I have one moment, please, Your Honor?

Judge Kolko: Surely.

By Mr. Redbord:

Let me direct your attention to GC-14 again. Would you take a look at it for a second?

Are the job classifications that are outlined on GC-14 those which were in existence at Sterlingwale?

A. Yes.

Q. And to the best of your recollection, are those wage rates in accordance with what the employees are receiving, effective the date of the document?

A. That is correct.

(p. 28) Mr. Redbord: Your Honor, I would move again for receipt of that, of GC-14.

Judge Kolko: Any objection, Mr. Clarkin?

Mr. Clarkin: I should. I don't know who produced this document, where it came from. I really don't think a proper foundation has been laid.

Mr. Redbord: I believe, Your Honor, that the witness has testified that it came from—that it was prepared by Sterlingwale.

Judge Kolko: That's what I though I heard.

Mr. Clarkin: I'm sorry. I withdraw my objection.

Judge Kolko: Okay, it is received.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 14 for identification, was received in evidence.)

Mr. Redbord: No further questions, Your Honor.

Judge Kolko: The witness is available for cross examination.

CROSS EXAMINATION

By Mr. Clarkin:

Q. Mr. Lenehan, during the period 1981-2, were you—in your position as an international representative of the UTW responsible for the administration of your contract with the Sterlingwale Corporation?

(p. 29) A. Yes.

Q. That was one of the shops that you covered?

A. Yes.

Q. How often did you have occasion to go down there in the course of an average month?

A. You're talking about how many average visits I would have made?

Q. Yes.

A. I would—it would be very dififcult for me to give you a specific figure. I—I don't know what your point is in the sense that, if they had problems we were there. If it were negotiations, we were there. If there were grievances, we were there.

Q. Let me rephrase the question. Is it fair to say that, during the period 1981, that you were a frequent visitor to the Sterlingwale—

A. A frequent visitor?

Q. Yes.

A. During the year of 1981?

Q. Yes.

A. No, I was not a frequent visitor.

Q. During the period of 1980, is it fair to characterize you as a frequent visitor to the Sterlingwale plant location in Fall River?

A. I would have to try and understand what you mean by (p. 30) frequent visitor. I—I—in other words, did I service the local?

Q. Yes.

A. Yes. If they had grievances, yes. If they didn't, no. We had union membership every month, except in the summertimes.

Does that answer your question?

Q. You met with Sterlingwale employees at least once a month, except in the—

A. Once a month,, is their regular meeting, except through the summer months. Exactly.

Q. Did you do the same thing in 1979?

A. Every year we did the same. Always did that. That was my job.

Q. I understand that.

In the course of performing your duties as the bargaining agent, the international representative at the plant, did you ascertain any increase or decrease in the number of unit members—union members you had who were employed by Sterlingwale during the period 1979 until February of 1982?

Mr. Redbord: Objection, Your Honor. It's quite irrelevant.

Judge Kolko: You want to give us the relevance, Mr. Clarkin?

Mr. Clarkin: I'm attempting to give Your Honor some (p. 31) evidence of background in terms of numbers. And I think, if this witness is allowed to answer, and think that through testimony of other witnesses, that the evidence will show, Your Honor—perhaps this is the way it will all be proved—that Sterlingwale, perhaps in 1979—relying on this witness as much as anything else—employed in excess of 200 people, approximately 175 to 180 were union members.

And from 1979 until what he's characterized as the plant closing on February 12 of 1982, there was a steady diminution in number of union members. I think that's important because I think that ultimately we're going to be faced with a question of numbers here, determining the majority.

I think that one of the base figures that's going to have to be decided upon is, what did the Sterlingwale unit consist of in terms of actual numbers?

Judge Kolko: I don't doubt the latter. I'm not sure I mean necessarily to get a trend, which is how I see what you're offering. For the moment, I just don't see it, unless we're absolutely—unless we totally have to do inferences and we don't have hard data.

Mr. Clarkin: Another subsidiary link here, in terms of relevancy, I think is the fact that you have a stipulated exhibit here—a list of current employees of Fall River Dyeing and Finishing Company as of April 22.

It was indicated to you at the time it was submitted (p. 32) that—the yes and nos next to those names. Yes, affirmative, indicates that the employee was a former employee of the Sterlingwale Corporation.

I would like, too, to show some background to Sterlingwale's operation, which I think would lend support to the fact that not all of the former employees of Sterlingwale listed on that exhibit were, in fact, employed by Sterlingwale at the time of the plant shut down in February of 1982.

Mr. Redbord: Your Honor, may I be heard?

Judge Kolko: Go on.

Mr. Redbord: Before this hearing is out, there will be payroll records—I was going to say, introduced, but I should say, attempted to introduced—from Sterlingwale, regarding the entirety of its employee complement for 1981, '82 when there was an employee complement.

To the extent that that is the purpose of Mr. Clarkin's inquiry, I would suggest that the records be the best evidence of that, as to the extent of the argument of the membership waning—which appears to be being made.

I still maintain that that's not relevant.

Judge Kolko: Wel, I'm not sure I see the relevance as clearly as you do, Mr. Clarkin. I will overrule the objection.

By Mr. Clarkin:

Q. Mr. Lenehan, was there, in fact, a steady decrease in (p. 33) the number of your union members who were

employed by the Sterlingwale Corporation for the period 1979 till February of 1982?

Mr. Redbord: Same objection, Your Honor.

Judge Kolko: Right. And let me, for the record, indicate—I used the term overrule, before. I sustain both objections, for the grounds stated by Mr. Redbord.

Mr. Clarkin: I'm sorry.

By Mr. Clarkin:

Q. During your direct examination, you indicated that the first knowledge you had of the close down of the Sterlingwale Corporation was when your wife related to you that she heard a radio report—

A. Television.

Q. Television report. And you indicate that was February the 12th—February 20?

A. 12th—20th I believe was on a Saturday, if I'm correct. I think that's the date.

Q. You agree with me that Sterlingwale Corporation ceased all production operations on February 12?

A. No, I would not. If you want me to qualify it.

Q. You wouldn't agree with me?

A. No. If you want me to qualify it.

Q. Did you bring—strike that.

By the terms of the contract between the (p. 34) Sterlingwale Corporation and your union, did you receive union dues through a check off system?

A. Yes.

Q. Did you bring records with you today to show what dues were paid by Sterlingwale employees in 1982?

Mr. Redbord: Objection, Your Honor.

Judge Kolko: It's a question, Did he bring records with him? I'll allow him to answer that question.

The Witness: Please?

Judge Kolko: Ask it again.

By Mr. Clarkin:

Q. Did you bring records with you that would indicate what dues were paid by which Sterlingwale employees during 1982?

A. No, I did not.

Q. Is it your best memory that, during the period February 12 to February 20, 1982, that you received no calls from employees of Sterlingwale, indicating that they had been thrown out of their jobs?

A. From employees?

Q. Yes.

A. I heard from the president of the union.

Q. When did you hear from him?

A. I heard from the president of the union on the—we were told by the management that they were indefinitely laid (p. 35) off.

Q. Do you recall what date that was, sir?

A. That was right after February 12. It was Monday, which was a holiday. Friday, was it? No, no. I'm

talking about the holiday that was on a Monday, following the day that they were laid off.

Q. Your testimony is that you had knowledge of this lay off on February 12?

A. The lay off? Exactly, a lay off. Not termination of the operation, though.

Q. Also on direct examination, you indicated that following this notice, that you had on various occasions met with representatives of the company to discuss different items of mutual interest. Is that correct?

A. Yes.

Q. And the items that you indicated that you talked about were medical insurance coverage and life insurance coverage for your members?

A. Right.

Q. You indicated further on direct examination that, at some point, $8000 was gotten together?

A. Yes.

Q. How was that gotten together?

A. The various people—we polled our people at a union meeting on a Sunday, as to the conditions that prevailed. And (p. 36) discussed the hospital coverage, so forth. We had received the rates from the management, what was necessary to be paid.

At that meeting, we did not know that the premium had not been paid for January and February.

So our immediate problem at that time was, what do we do to help these people in terms of their coverage? And

when we found out the premiums weren't paid, we were in trouble. So we—people signed their name, those who wished to continue the coverage. And I think there was approximately 30-some odd people. Plus there was office help, and there was Mr. Ansin and Mr. Chace was on the list. They were—they were—we were all in the same boat.

And that's what I devoted my time to, to take care of the immediate problem.

Q. I understand that. To get back to my question, where did the $8000 come from?

A. It was collected from the people to pay the premium. They had to pay the premium themselves.

Q. For the period January and February?

A. January through March. They had to pay for January and February; the company didn't pay. And March was the current month, so to pay it up to date, the money had to be in by March 29 or you had no coverage. It's as simple as that.

Q. Is it your understanding of the collective bargaining agreement that it required the company to make those (p. 37) payments for January and February?

A. The collective bargaining agreement entails whatever might be involved, whether it's paying the premiums, whatever. They—we negotiate with the company for coverage. It's their responsibility to make the payments.

Q. Well, did the company meet its responsibility—

A. Apparently they didn't.

Q. Apparently? Did they or didn't they?

A. No, of course they didn't.

Q. Now, you indicated the company was very cooperative with you?

A. Yes.

Q. Did the company agree to pay that deficit, to meet that obligation?

A. No, they didn't.

Q. They didn't?

A. No.

Q. You had to go to your own members and have them pay it out of their own pockets. Is that correct?

A. Not only our members, but the management went to their own employees, including Mr. Chace and Mr. Ansin, to pay it out of their pocket. And the office help and so forth.

Q. Mr. Chace had to pay—

A. Mr. Chace, his name was on the list. Whether he paid the money or not, all I know is, the premium was sent in for (p. 38) approximately $8000 to Massachusetts Mutual to cover all of us that were willing and able to participate.

Q. And your best memory is that about 30 people elected to try to continue coverage—

A. Of our members, and then we would have to add on the management personnel who—

Q. How many members elected not to continue the coverage?

A. Well, I—the majority of them, obviously.

Q. How many?

A. Rough guess, maybe 125, -30, or whatever the figure might be.

Q. So 125 and [sic] 30 said no, they weren't going to pay for that insurance the company is supposed to pay, and about 30 said yes, they would pay it to maintain coverage for themselves?

A. [No verbal response.]

Q. Could we call that a resolution of the medical insurance problem? Is that a fair characterization?

A. Well, I wouldn't call it a resolution, because we wound up out in left field. If you want me to elaborate on it—

Q. No.

A. —I can elaborate on it.

Q. But at some point, you disposed of that as an issue?

A. We merely got that coverage for the three months and—

Q. Is it not true that you then moved into other areas in (p. 39) your discussions with the company?

A. We moved into areas in terms of finalizing the problem with the insurance. I might—what I'm saying is, the $8000 didn't solve the problem. The problem continued for the people because we had trouble with the insurance company. And also the state law of Massachusetts, of what should be done about it, etc. So we spent our time with that for months, by the way.

Q. For months?

A. Yes.

Q. At some point during these months after February 12, did you have discussions with the company relative to severance pay?

A. We filed a grievance in terms of severance pay and vacation pay.

Q. And vacation pay?

A. Yeah.

Q. Now, taking severance pay separately, did you proceed to arbitration with that grievance?

A. We received a reply to our grievance from the company's attorney, Paul Horvitz, and said that he would not be willing to sit down with us.

Q. He wouldn't discuss the grievance with you?

A. That's right.

Q. At the time you filed that grievance, was it based upon (p. 40) your understanding that different members of your unit at Sterlingwale were, in fact, entitled to some kind of vacation pay?

A. It was our opinion that it would be something that should be arbitrated, yes.

Q. Was that based upon your understanding of the collective bargaining agreement?

A. Yes.

Q. And you filed a grievance with the company?

A. Right.

Q. The company attorney said no, he wouldn't even discuss it with you?

A. I forget the exact words. They denied meeting on it or going—

Q. Well, after receipt of—

A. —to arbitration.

Q. —that refusal, did you, in fact, preceed to arbitration?

A. No, we didn't.

Q. You didn't?

A. No.

Q. Did you file any kind of a charge with the National Labor Relations Board?

A. Of course we filed a charge with the National Labor Relations Board.

Q. You did?

(p. 41) A. Of course.

Q. Do you recall when you filed that?

A. Oh, it—

Mr. Redbord: Your Honor, I'm going to object at this point. I understand it's cross examination. But to go into this much detail on the vacation and insurance benefits is, I think, not necessary.

Judge Kolko: Mr. Clarkin, in terms of the issues of the case, I'm curious as to where this is leading us.

Mr. Clarkin: I think that one of the defenses that is—will be raised by the Employer is a good faith doubt as

to the majority status of the union. And I think that, as part and parcel of that, that the attitude of former employees of Sterlingwale toward this union I think will evidence itself in—as a basis for this good faith doubt.

I think, to the extent that employees of Sterlingwale were, in fact, dissatisfied with the activities of their union representatives after February 12, 1982 in their efforts to solve such problems as the breach of the contract by the company relative to Blue Cross and Blue Shield payments, relative to—there apparently is going to be a lack of severance pay and inability to obtain vacation payments for them, I think it is relevant.

Judge Kolko: All right, I'll take the line.

You'd better ask him again.

(p. 42) By Mr. Clarkin:

Q. We're talking now about the company's refusal to pay vacation pay to employees. My question to you is, did you proceed to a hearing with the National Labor Relations Board after filing a charge against the company—

A. Yes, we—

Q. —for refusing to pay—

A. —did.

Q. You did?

A. We did.

Q. Do you have a decision on that?

A. We have a decision on that, yes.

Q. Did you prevail?

A. No, it was denied by the National Labor Relations Board.

Q. Okay, it was denied?

A. [No verbal response.]

Q. Now I turn to the question of severance pay. It's my understanding that you also made a claim for severance pay against Sterlingwale?

A. Yes.

Q. Do you recall when you made that claim?

A. We—our charge—we filed charges against the company with the National Labor Relations Board because the company refused to recognize the union's right to go to arbitration. (p. 43) And we were denied by the National Labor Relations Board. That takes care of the severance pay, the vacation pay, whatever.

Q. So they wouldn't discuss severance pay with you, then?

A. Who wouldn't discuss it?

Q. The company.

A. That's why we went to the National Labor Relations Board. I told you the attorney refused our grievance, and refused to go to arbitration. And we filed the charge with the National Labor Relations Board.

Q. Didn't you characterize the position of the company after February 12, vis-a-vis the union, as very, very cooperative? At some point in your direct examination?

A. Yes, of course they were very cooperative, in the sense of Mr. Ansin showing his concern, making an effort—

as far as I knew—to get somebody to take over the plant, or whatever he could do.

The point I bring out here is this: in this whole situation here, our attitude was to get the plant going, get people back to work, whatever. And we continued that. And we still continue it, by the way.

So if you think cooperation—that there's anything wrong with it, well, say so.

Q. I'm going to ask the questions, Mr. Lene—

A. That's all right. I'm answering them.

(p. 44) Q. Now, what you're telling me, then, is that your primary objective in any discussions you had with the company after February 12 was to attempt to get Mr. Ansin to reopen the operation?

A. Yes. Re-employment. That the plant would be running, and that the people would have employment. Exactly.

Q. And that these issues relative to the payment of medical insurance, life insurance, vacation pay entitlement and severance pay entitlement were really subsidiary; they were secondary?

A. They weren't subsidiary, because we went to the National Labor Relations Board and was denied. We did everything we could for them.

Q. Okay. Now—

A. And that includes with the insurance company. And the state of Massachusetts labor department, also.

Q. With the department of labor and industries—

A. Absolutely. We filed there, also, too.

Q. Did they seek criminal complaints against Mr. Ansin for failure to pay vacation benefits?

A. They—they indicated to us what direction we could go in and what action could be taken—

Q. Did you, in fact, seek criminal complaints in the Second District Court in Fall River against Mr. Ansin?

A. No, we did not.

(p. 44) (sic) Q. Why not?

Mr. Redbord: Your Honor, I'm going to object again. To the extent that Counsel indicated a response to my earlier objection, that he thought his had some relevance to some sort of waning interest, I would continue to maintain that, first of all, it's not relevant in any case. But second of all, even if somehow marginally relevant, at this point it's just going beyond what—the inference Mr. Clarkin would have us draw.

Judge Kolko: Mr. Clarkin?

Mr. Clarkin: It's the position of the company, Your Honor, the employees—a large majority of the employees in this company do not want representation by this union. And we have good reason to believe them .

And the only point in the cross examination of Mr. Lenehan for the past 10 or 15 minutes has simply been to provide you, the finder of fact, with some credible basis for this feeling among former employees of Sterlingwale. I think, to the extent that I'm able to demonstrate to you that there—of five basic issues or concerns here that were taken up between Mr. Ansin and the union, not one of them was

resolved in favor of those employees through the union's efforts. I think it's very, very relevant. The attitude of current employees of Fall River Dyeing, who were former employees of Sterlingwale.

(p. 45) Judge Kolko: Go ahead, Mr. Redbord.

Mr. Redbord: Your Honor, if I may just point out, as far as the Board's—good faith doubt is certainly in question. But the good faith doubt that is under consideration here is a good faith doubt based upon the Employer's objective considerations.

What we're going into here now couldn't be more subjective because we have to decide what Mr. Lenehan did, where that went, what kind of inference one employee might draw, another one, and so on and so forth. And it gets us nowhere in terms of objective considerations.

Judge Kolko: Well, I would assume that, insofar as tying employee sentiment to Employer knowledge, you have that in mind. Because if you don't, then Mr. Redbord's entirely correct.

Mr. Clarkin: I do, Your Honor.

Judge Kolko: All right, I'll take it on that basis. And for technical purposes, I'll overrule you, Mr. Redbord.

By Mr. Clarkin:

Q. In summary, then, Mr. Lenehan, as a result of discussions that you had with Sterlingwale representatives after February 12, 1982, is it fair to say that, one, Mr. Ansin did not reopen Sterlingwale? Is that correct?

A. As far as I know.

Q. Two, the employees did not receive vacation pay? Is (p. 46) that correct?

A. No, they didn't receive vacation pay.

Q. Three, the employees did not receive severance pay? Is that correct?

A. That's correct.

Q. Four, they did not receive Blue Cross or medical insurance coverage during the period January 1 through February 12, 1982—

A. They did receive coverage.

Q. They didn't—

A. They did.

Q. They did?

A. [No verbal response.]

Q. Who paid for that coverage?

A. As I previously stated, the people paid for it.

Q. Who was supposed to have paid for it?

A. Please?

Q. Who was supposed to have paid for it? Who was supposed to have paid for that coverage during that period?

A. The company was obligated, under the contract.

Q. Now, you indicated sometime in October, you directed a letter to the company. I believe it's GC-15. You recall writing that and sending that letter—

A. Yes, I did.

Q. You also indicated, I believe, that your first knowledge (p. 47) of the fact that there was a manufacturing operation taking place on the premises, or a portion of the premises, on Stevens Street, formerly occupied by Sterlingwale, was on or about September 20, because of a newspaper ad?

A. In the month of September. I'm not certain of the date.

Q. But in any event, there was a lapse of time between your first knowledge of the fact that someone was operating in this location, and the sending of this letter, was there not?

A. Please? Can I hear that question again?

Q. Was there not a lapse of time between your first knowledge that someone was operating at the Stevens Street location and your sending of this letter, purportedly on October 19, to Fall River Dyeing & Finishing Company?

A. Yes.

Q. How much of a lapse was that, actually? Four weeks?

Mr. Redbord: I would object, Your Honor. The witness has said he's not sure when in—

The Witness: I don't know the particular date.

Judge Kolko: I'll overrule the objection. We've gotten an answer from the witness.

By Mr. Clarkin:

Q. You don't know the particular date?

A. [No verbal response.]

Q. Why did you send this letter?

(p. 48) A. To ask the company to sit down with us.

Q. Somebody tell you to send that?

A. Nobody told me to send it. What do you mean, did somebody tell me to send it?

Q. Well, I'm just asking a question. Your answer is, nobody told you to send it?

A. I sent it, representing the people, on behalf of the people.

Q. Before you sent that letter, did you talk to the people?

A. We had, I guess, about three meetings, I guess, with the people, in terms of the hospitalization, reporting to them with respect to the Department of Labor—

Q. When was the first meeting?

A. I—I'd have to—the first one I think was—let's see. The—the plant closed on a Friday. Was it that Monday, or Sunday, rather? I'm not certain.

Right—right immediately after, we held the meeting. As I indicated here before, we didn't know the premium hadn't been paid at that particular meeting.

Q. That was your first meeting with the people? Is that correct?

A. Exactly.

Q. When was your second meeting with the people?

A. I can't give you the dates right here and now.

Q. Was it in the summertime?

(p. 48) (sic) A. We had two or three meetings with the people, yes.

Q. Do you recall when the third meeting was?

A. I can't give you the dates. I can look them up, if you want me to.

Q. Do you recall having a meeting with the people anytime on or after September 20, but prior to October 19 of 1982?

A. I'm not too certain if we did. I'd have to look that up. I'm not too certain.

Q. Did you attempt to ascertain, prior to sending that letter on October 19, how many people were employed in production and maintenance jobs at Fall River Dyeing & Finishing?

Mr. Redbord: Your Honor, I would object. The same basic line of objection I've been making. I just don't see the relevancy of what Mr. Lenehan attempted to ascertain prior to making a claim.

Judge Kolko: Do we need his ascertaining or not?

The Witness: I'd be glad to answer it. What's your question? October—

Judge Kolko: You don't have to.

I'm going to sustain the objection.

By Mr. Clarkin:

Q. Do you know how many people were laid off, how many members were laid off, on February 12, 1982?

A. I'd say approximately in excess of 150, or something (p. 49) like that.

Q. In excess of 150?

A. Somewhere in that vicinity, yeah.

Q. Who actually received their notice that day?

A. I would have to qualify my answer, when you say received their notice. There was no written notice to either members or the union. They were merely told by the foreman, they're indefinately laid off.

Q. So 150 were told—

A. Indefinately laid—

Q. —February 12?

A. —off.

Q. Were you aware of any further production activity, in terms of the processing of griege goods, finishing of griege goods, dyeing of griege goods, that occurred on the premises at Sterlingwale after February 12 of 1982?

A. I'm not familiar with it.

Q. You don't know, then?

A. [No verbal response.]

Q. Is it fair to say, then, to the best of your knowledge, all production ceased as of that date?

A. Well, I—my observations would be, depending on what you would classify production to be. If there was activity in terms of goods going out or something of that sort, there was—

(p. 50) Q. But that would be the only activity?

A. Well, to my knowledge.

Mr. Clarkin: Thank you very much, Mr. Lenehan.

Judge Kolko: Anything further?

Mr. Redbord: Just one or two.

REDIRECT EXAMINATION

By Mr. Redbord:

Q. Mr. Lenehan, just to clear up something, in your testimony on cross examination, you were talking about when you learned of the lay off, when you learned of the termination of an operation. Is that the same thing to you? The lay off of people versus the cessation of business?

A. Well, I think they're two separate items.

Q. As far as the vacation pay, severance pay, medical insurance and reopening of the plant are concerned, do you believe that the union did everything reasonable in that regard to secure those things for—

A. Absolutely.

Mr. Redbord: No other questions, Your Honor.

Mr. Clarkin: No further cross. Thank you.

Judge Kolko: You're excused. Thank you, Mr. Lenehan.

(The witness was excused.)

Mr. Redbord: Mr. Ansin, please.

(p. 51) Whereupon,

LEONARD ANSIN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Redbord:

Q. Would you please state your name and address for the record?

A. Leonard Ansin. I live in Newton, Mass.

Q. Are you appearing here today under suppoena, sir?

A. Yes, I am.

Q. Could you tell us where you're currently employed?

A. I'm self-employed.

Q. Have you ever been connected with Sterlingwale Corporation?

A. Yes, I have.

Q. And could you tell us, what were your responsibilities in regard to Sterlingwale?

A. I was the president of the corporation and responsible for directing the corporation.

Q. When did you—

Mr. Clarkin: I'm sorry. I didn't hear him.

The Witness: I was responsible for directing the corporation. The president.

Mr. Clarkin: Thank you.

(p. 52) By Mr. Redbord:

Q. When did you begin your association with Sterlingwale?

A. On a part time basis or full time basis? Back in the early '50s.

Q. As a part time basis?

A. Part time basis.

Q. And there came a point in time when you became full time—

A. Full time basis in the early '60s.

Q. Early '60s?

A. Yes.

Q. Could you tell us just briefly what kind of business Sterlingwale engaged in?

A. Sterlingwale was primarily involved in the dyeing and finishing of tetxiles and also the cutting, dyeing and finishing of corduroy fabrics. And they were also involved in selling directly to the trade, meaning, they were involved in selling fabrics directly to the apparel trade.

Q. So as I understand it, then, there were two types of—two classifications to the handling of textiles. Is that correct?

A. In the last few years with the corporation there were, correct.

Q. And those two classification would be? Can you title them each?

(p. 53) A. The company— one classificition was primarily known for cutting, dyeing and finishing of corduroys, and sale of the corduroys directly to the apparel trade.

As another classification, we were also involved in doing some contract finishing of corduroys for converters in New York, and contract finishing of other types of non-corduroy—we call flat fabrics—for the industry, for the textile industry, which was finished for textile converters in New York. Primarily a New York market.

Q. So as I understand it, then, Sterlingwale handled in its latter years the two. both flat goods and corduroys?

A. Yes.

Q And when you say latter years, what time period are we talking?

A. I would say the years of '81, '80, '79 to a small extent.

Q. Wow, in terms of—

A. On flat fabrics.

Q. On flat fabrics?

A. On flat fabrics.

Q. And prior to that, it was—

A. Prior to that, we were primarily converting our own fabric. But prior to that in the early '70s, the '80s, we were doing converting and commission finishing of corduroys.

Q. Let me take that. So there's also converter versus commission type of work?

(p. 54) A. Yes.

Q. Now, in terms of the converter and commission, can you tell us— strike that.

In terms of the employees and the work that they did, could you tell us what difference, if any, it made to the employees in the production process as to whether something was converter or commission work?

A. If an employee was running a corduroy fabric through a machine, it technically should make no difference. It was my policy, whether we were running corduroy for our own converter department, or running corduroy for a commission finishing customer — the policy was the quality was to be the same. And the end result was to be the same.

So the employee was directed to— to manufacture the fabric in the same way, no matter whether he did it for the converting department or the commission finish department.

Q. Could you tell us to what extent, if any, there was difference in the actual production process for corduroy as opposed to flat goods?

A. In corduroy finishing, primarily what we did in that plant, what I did in that plant, is when we receive griege goods, we had a number of processes. I don't recall the exact number, but I would say roughly 10 to 12 processes. Everything from making the bale up to the proper size. to back sizing to cutting — and this is all related to corduroy. (p. 55) Back sizing to corduroy cutting to inspection to preparation of the fabric, bleaching, dyeing, finishing, dyeing. drying, inspection and ultimately going to the customer.

When an employee ran non-corduroy fabric, a flat fabric, we eliminated the back sizing. The griege goods still had to be received. We still had to put 'em up in the same

bale size form that we would normally do for corduroy. So the bale size form would be the same.

The back sizing was eliminated 'cause that's not needed in flat fabric finishing.

The corduroy cutting department was not needed in flat fabric finishing.

The inspection after cutting is not necesary in flat fabric finishing.

Then you come into the bleaching— the preparation and bleaching. Basically, preparation and bleaching is the same for non-corduroy as for corduroy. And the dyeing is basically the same. There can be a slight change of formulation of the chemicals going into the machine, but to the employee—as he's directed by the supervisor—whether he puts chemical A in or chemical B in, it's technically the same job.

And the same thing in the dye house. If he's dyeing corduroys, if he's dyeing flat fabrics — it's technically the same job. Corduroy may require reactive dyes or sulphur (p. 56) dyes; flat fabrics could require the same type of dye stuffs.

Technically, the jobs are the same jobs. It's elimination of jobs prior to the bleaching significantly changes it between corduroy and flat fabrics; the only difference.

Q. I don't think you've answered this already. Can you tell us if, in the last, say, two years that you were running Sterlingwale, what percentage of the incoming goods were flat goods and what percentage were corduroy?

A. Oh, boy. That would be— boy. I really just can't give you intelligent information on that. I'd have to go back into the records, even if the records are available, to try determine that.

Q. Was it—

A. It is safe to say that we were building more towards contract finishing and away from converting.

Q. That would be meaning more towards flat goods?

A. Flat goods and corduroy finishing. Flat goods, contract finishing and corduroy contract finishing — as compared to converting of our own fabric.

Q. Was the situation such with the commission versus the converter, was it such that that was cyclical in any sense? Or how did that work?

A. Well, the corduroy finishing was very cyclical. It would run busy from the months of March. April through August, September. It was hoped that, by bringing in the flat fabrics (p. 57) — the non-corduroy styles — we would try to balance out our production in order to keep our employees employed on a 12 month basis.

Q. Can you tell us from your recollection what types of machines the employees would work on in the course of their duties?

A. What kinds of machines?

Q. What kinds of machines.

A. Well, let's see. In the— go by department to department, from the time the fabric is received until the time the fabric goes out the door. As a fabric's received, it goes onto a beaming machine which is designed to put

the bale into the proper sized form, depending on the weight of the fabric. And the next operation, if it's a corduroy— if it's corduroy, it goes to a back sizing machine.

Then it continues on. From back sizing, it would go from one building to another building, up a conveyor to the third floor where we would see it go through a corduroy cutting operation that's designed to put the wales into the fabric.

From the corduroy cutting operation, it would then be inspected before it goes into work to be sure there's not any defects in the fabric.

From that point on—

Q. Are there machines used in that step?

A. Yeah. The— there's a corduroy cutting machine. There's (p. 58) three different models in the world made. There's one made by Firsching in West Point. The second one is made by Franz Mueller.

Then from the corduroy cutting machine, it will go on an inspection machine. The inspection machine can be homemade or made by umpteen different people. But it's called— just called a fabric inspection machine.

Then from that point, it would go into our preparation range. Our preparation range was designed strictly for ourselves. There's no specific name for that range, except it's called the fabric preparation range.

And from there, it would either go on to the— the rolls either go onto the jigs, which is a— a type of dyeing machine used for small batch dyeing, or the fabric would

go onto a pad, which is another manner of applying dye to fabric.

From there, it could be routed to washing back on the jigs. It could be routed to— there's a number of ways it could be routed, depending on the fabric and depending on the end result. But there's preparation, there's dye jigs, there's dye pads, there's dry cans after dyeing.

Then from dry cans — that's to take the moisture out of the fabric — it would go onto an inspection machine. An inspection machine is just to determine what kind of faults there are in the fabric. It would go from there onto a finishing frame which would apply a finish such as a deep (p. 59) Z bell or a wrinkle resistant finish. And then it would be framed out the width that's designed for that customer.

And then, from that point, it would be tubed from large rolls onto small rolls, 70-80 yard rolls which would easily handle a lot of the common cutting. And then it would packed into cases and out the door.

Q. Now, regarding the work that was done, you indicated I believe that, from time to time, it was seasonal. Did that have any affect on the fluctuation in the work force?

A. It would.

Q. Could you describe that—

A. Well, during the winter months — meaning the months of November, December, January, February — corduroys were not purchased from our company. We were more of a type of company where they considered us a fill in supplier. And so when the stores started reordering corduroy, they would reorder through their sup—their

garment manufacturer, who would buy from us, because we could supply the small dollars in the season. And the season was really March, April right through September, Octobor period.

Our competition, the verticle mills, could not supply it in the small dollars, efficiently, like we could.

Q. Did the flat good production have any cyclical nature on the employees?

A. Well, it was intended to eliminate the cyclical problem. (p. 60) But we just— I just never had enough time. We ran out of cash, in order to— we just never had enough time to put it into operation, full force and operation. It was our intention to run a combination converter fabric and commission finishing fabric in order to keep the people employed 12 years [sic].

See, we— the Ansin family owned that company for 30 years. And it was started by my father. And we ran into a lot of difficulties back in '79, due to the economic situation. We ran into difficulties with interest cost in the country went very high; energy costs skyrocketed. And— but still I— I saw the handwriting, problems happening. Our financial condition was weakening, even though we received a very sizable loan from a Massachusetts-quasi-public corporation to assist us in financing new machinery for the business. And after that, we started to get into some difficult problems. And I still hung on and tried to save that business, because I owed that to the community. 'Cause we were— we employed people in that town for 30 years. I owed it to employees. There are people sitting in this room here who've been with the company for over 25 years; good people. But we just ran out of cash.

We were shut off by— we had some long term financing agreements with our major griege goods suppliers. And one of them decided to liquidate their company, too. And that (p. 61) happened in the middle of February. One of the major griege goods suppliers, who was part of a long term financing agreement. And they day they decided to liquidate their business, they were 90 years in business; besides the other three suppliers who were not— were reluctant and would not supply us on open account. There was no future in maintaining that plant, 'cause we ran out of cash.

We did not have the cash to go to the market to buy the raw materials, on a cash flow basis— cash delivery basis.

Q. Let me— let's pick it up at that point in time. I gather the scenario you described led to a point in time when—

A. Let me clarify; the Ansin family lost millions. I'm not sure if that matters, but I want to leave that in the public records. The Ansin family could have pulled out of that operation years prior to that. We just left— I decided, along with the directors. decided not to, 'cause we owed it to the city and our employees. And we stayed on.

Q. Then there came a time when the employee complement was laid off indefinately?

A. That's correct.

Q. Do you remember when that was?

A. Oh, I don't recall the exact date, but it was the middle of February.

Mr. Redbord: If I may, Your Honor, just for purposes (p. 62) of clarifying, I'm going to ask the witness to identify certain documents but I'm not going to have them marked because these are computer records and I intend on introducing copies of them. And I don't have the copies at the moment. I'm not going to have these particular documents marked.

By Mr. Redbord:

Q. Mr. Ansin, I would like to show you a large book here and ask you if you can tell us what this is.

A. These are the payroll records of Sterlingwale Corporation for the period ending December, 1981.

Q. And is there any part of this — let me direct your attention, if I may to what, in the computer printout, are green pages and ask you what these particular green pages here at the top are.

A. The green sheets are the year - to - date summary by employee of their earnings to date, along with social security number, time card number, etc.

Mr. Redbord: Could we go off the record for one second, Your Honor?

Judge Kolko: Let's be off the record.

(Discussion off the record.)

Judge Kolko: On the record.

By Mr. Redbord:

Q. Now, directing your attention to the first name, Albernaz, the first entry there would be file number?

(p. 63) A. File number. Then to the right of that would be his—the name of employee and department number and department.

Q. There's an M in the middle. That's—

A. Sex.

Q. And after that, there's something called home department?

A. Right.

Q. Now, there's different numbers for each employee. Is that correct? In home department?

A. Each— we would assign a department number to each employee for the computer records and also for knowing information within the office. Each employee is assigned a department number, a social security number which is to the right of the department number, and a clock number, along with his rate of pay, etc.

Q. Do you recall what the department numbers stand for?

A. I can, if I had—

Q Do you have anything to refresh your recollection on that?

A. Let's see if I do have. Albernaz, department number 250, would be dye house.

Now, let me explain dye house. It could, to the best of my recollection, could take in a dye jig operator; it could be a crane operator. I don't recall the different titles. It could be— it could be drug room man. There's a number of (p. 64) different jobs involved within the dye house.

Q. So you recall the other departments and what they stand for?

A. Going right down the list here, the next department number—

Q. Maybe you can do it for each employee, 'cause we'll have the number and each department, as we go along.

A. Okay. Department number 500 is utility.

Q. And what would the utility department include in terms of employee tasks?

A. I believe it would be under the auspices of the retail area, where we cut remnants. This is the best of my recollection. Where we cut remnants and store retail fabric and cut pound goods for sale to stores and to goods jobbers.

Next number is number 450, which is mechanic custodian. That would be maintenance department. Custodial would be cleaning, sweeping and cleaning.

410 is assistant samples, sample department.

Department 400, packing and tubing.

Department 350 is finishing department.

Department 300 is inspection.

Department 250, I already explained, dye house.

Department 200, word processing.

Department 150 is cutting, and department 100 is warehouse, receiving, make up, etc.

(p. 65) Q. You mentioned 200 word processing. And earlier, you talked about something on preparation. Is that the same?

A. Preparation, word processing, would be classified as the same thing.

Q. Now, these payroll records all— strike that.

These job classifications, department as indicated, could you tell us, were those people represented by any labor organization?

A. Yes, they were.

Q. Would those be the unit classifications that you've just gone through, in the bargaining unit that was represented by the—

A. These various numbers, you mean?

Q. The numbers that you just read off.

A. I don't believe we referred to it as a bargaining unit. I'm not sure I understand exactly what you're saying.

As far as I was concerned, if you were talking about negotiation, we had a contract we negotiated with.

Q. Right. And the departments that you just read off, were those categories of people under which were covered in negotiations?

A. Yes, they were.

Q. Now, do these documents also have any groups of people who were not covered in negotiations? When I say these documents, I'm referring to—

(p. 66) A. Well, these departments here would have— would have non-union supervisory help, office help, executive help.

Q. Do you happen to know the numbers of the departments that would correspond to those types of groups? The supervisory—

A. I'd— I really don't recall off hand. I'd have to go in there and find out which ones they were.

Q. Let me see if I can refresh—

A. It would take a few minutes to do it.

Q. —your recollection.

A. Here is one—

Q. Yould it be 640 for supervisors?

A. Yes, 640 would be one.

Q. And what about—

A. 810 would be one.

Q. 810 would be Mary Bacon, would that be—

A. 810 would be Mary Bacon. 640 would be supervisors in the plant.

Q. And was there not also a sales group—

A. We had a New York sales department; 710 is New York sales department.

Q. And were there also not office people?

A. Were they not all under— let's see. 810. 810, office people.

Q. Now, there is any number not accounted for. I believe (p. 67) we've not accounted for 650.

A. Jeanne Lavoie, 650; that was another classification within the office. It was a management function.

Mr. Redbord: Your Honor, at this time, I would have the copies of those documents marked as exhibits. And obviously the originals are here for anybody to check.

Judge Kolko: Let's be off the record.

(Discussion off the record.)

Judge Kolko: On the record.

Let's give us an identification of GC-17—

Mr. Redbord: Your Honor, at this time, I have had marked for identification as GC-17 copies of the payroll records of Sterlingwale Corporation for the year 1981 and is summarized in the year to date.

I would note for the record that the exhibit includes a number of stapled documents. The computer sheets are too big to get on a Xerox machine. Accordingly, two of these pages that are stapled together indicate one computer sheet. This obviously is the overlap. There are 18 names on each of the pages, and there is obviously an overlap between any two pages of Xerox that cover the same page from the computer print out. And I would move for the introduction of GC-17 now.

Judge Kolko: Any objection?

Mr. Clarkin: I have no objection. I would like to have (p. 68) the number of pages identified. I count 37.

Mr. Redbord: Yes, 37.

Judge Kolko: Okay, it's received.

(The document above-referred to was marked General Counsel's Exhibit No. 17 for identification and was received in evidence.)

By Mr. Redbord:

Q. Mr. Ansin, I now show you a computer print out here and ask you if you recognize that.

A. These are the individual employee sheets for 1982, first quarter, meaning January, February, March of 1982. The earnings per week by employee.

Q. And this was prepared by whom?

A. This was prepared by ADP, the same people who prepared the other payroll sheets.

Q. Now, the—

Mr. Redbord: Your Honor, I have marked copies of these documents as GC-18 and it consists I believe of 178 pages, one page for each person, as opposed to the previous document which is a year to date summary.

I would offer these documents.

Judge Kolko: Any objection?

Mr. Clarkin: No objection, Your Honor.

Judge Kolko: Received.

(p. 69) (The documents above-referred to were marked General Counsel's Exhibit No. 18 for identification and was received in evidence.)

By Mr. Redbord:

Q. Now, Mr. Ansin, where was Sterlingwale located?

A. It was located in Fall River, Mass.

Q. How many buildings did it have?

A. Well, we classified it, technically, as really three buildings. It had a red building; it had a green building, which is to the rear; and we had a small wooden office building.

Q. Of the red and green building, which is the production building, if only one of them is?

A. The production building really is the red building.

Q. What went on in the green building?

A. The green building was for receiving of the griege goods, was for putting the griege goods up in the right size bale form, was for back sizing before corduroy cutting, and was also for storage of bales ready to go into work and also storage of finished cases because a number of times customers would give us advance notice and we'd have to build up inventory to be shipped to specific locations. And we needed the space to store the finished inventory, so the green building was used for that also.

(p. 70) Q. And can you tell us what happened to the premises and the buildings thereon after Fall River ceased operation?

Mr. Clarkin: I think you mean Sterlingwale.

Mr. Redbord: I'm sorry. Sterlingwale. I apologize.

By Mr. Redbord:

Q. After Sterlingwale ceased operation?

A. You want to know— could you repeat that question for me?

Q. Let me strike it and rephrase it.

Was there— did somebody hold a mortgage on that property?

A. There was mortgage on the properties, yes.

Q. And who held the mortgage?

A. On the buildings, there was a second mortgage held by the major creditors. And there was a first mortgage held by Mrs. Ansin.

Q. And did there ever come a time, if you know, that there was a foreclosure on the premises?

A. Yes, there was a foreclosure sale.

Q. And who foreclosed?

A. On the red building, the first lien holder foreclosed.

Q. Who was?

A. Mrs. Ansin.

Q. And what about on the green building?

A. The green building, the first lien holder foreclosed (p. 71) there. That was Mr. Catroano.

Q. Are you familiar with something called Mass Capital Resources Corporation?

A. Yes, I am.

Q. Could you tell us what role, if any, they had in the financing and eventual security interest of any property at Sterlingwale?

A. They made us a long term loan — "long term loan" — that allowed us to purchase certain machinery in order to try to make the plant more modern and more efficient. And they took a first lien on all— all the machinery, etc., within the building, with the exception of the buildings themselves.

There was also a second lien on that machinery, too. That was held by the major creditors.

Q. Now, when Sterlingwale— as I understand it, there came a time when Sterlingwale laid off the employee complement in mid-February, as you testified. Am I correct?

A. That's correct.

Q. Could you tell us what, if anything, for that matter, Sterlingwale continued to do after that time?

A. Well, it was— since that I did not see a way that Sterlingwale could survive in its original form, I sat down at major creditors and told them I would continue to be involved in the company in order to clean up whatever there (p. 72) was to be cleaned up. For example, there was— we had to be sure all taxes were paid. We had to be sure that all the fabric that was in the plant got moved out of the plant. And there was buildings there to be maintained. There was machinery there to be liquidated. There was a company to be liquidated.

So I stayed on right through July and worked— actually continued to work for the corporation, as president of the corporation. There was no bankruptcy, no Chapter 11. And all—all the money that came in, I had complete control of all the cash that came in from liquidation of inventory.

Q. Who conducted that liquidation of inventory?

A. Up to the middle of July, I conducted all liquidation of inventory.

Q. What about after that?

A. After that, when we made an assignment for the benefit of creditors, that was held under the direction of the asignee, Barbara Goff, who hired an outside liquidator—

Q. Did you ever hear of Beacon Liquidators?

A. Yes, I have.

Q. Could you tell us how you heard of them?

A. Well, Beacon Liquidators were hired by Barbara Goff to have a final auction sale, whatever assets there were outside of machinery, to be liqui— whatever assets there were outside of machinery to be liquidated. And Beacon Liquidators are (p. 73) professional people at organizing and having auction sale.

Mr. Redbord: Your Honor, may we go off the record for a minute?

Judge Kolko: Off the record.

(Discussion off the record.)

Judge Kolko: On the record.

By Mr. Redbord:

Q. Mr. Ansin, I would like to show you what's been entered as General Counsel's Exhibit 10. It's a list of customers. Now, I'd ask you to note what it says at the top there, which is that customer names underlined were also customers of Sterlingwale.

I'd like to ask you to take a moment to peruse that and see if there are any customer names not underlined that you recall being customers of Sterlingwale.

A. There's one at the bottom here, line number 39. I think Kaplan Products, I believe they were.

Textile Duff and Wheel, I believe that was also a whatchamacallit [sic], a customer.

I thought Wall was also one, too.

Tilbury used to be a converter fabric customer. We used to sell it finished fabric.

I thought we did work for Silverman Products. We may have just done trials. I don't recall. But I know the name Silverman Products.

(p. 74) Magicord. We may have done work for Magicord. I don't recall that one, either. But—specifically. But you also realize in the textile industry, names change quickly. Converters come and go. My goodness, the business is like— that's why I have a factor. A factor guarantees receivable. And these textile converters and apparel people come and go, and this list could be good today and six months from now you could have a brand new customer listing.

Q. Well, okay, but —

A. But the same people, different names.

Q. But as of now, from what you can recognize — which is all we can go by at this point in time — those are the ones not underlined that you recall?

A. Yes.

Q. And no others that you can recall at this time?

A. Not specifically.

Q. Do you recall something else?

A. Masco International, just that it seems to be a lot of dollar sales there.

Mr. Redbord: Nothing further, Your Honor.

Judge Kolko: Let's go off the record for a second, please.

(Discussion off the record.)

Judge Kolko: On the record.

We will stand in recess at this point, until 2:00 this (p. 75) afternoon.

Off the record.

(Whereupon, at 1:05 p.m., the hearing was recessed, to reconvene at 2:00 p.m. the same day.)

(p. 76) AFTERNOON SESSION

(2:00 p.m.)

Judge Kolko: On the record.

Whereupon,

LEONARD ANSIN

resumed the stand and testified further as follows:

CROSS EXAMINATION

By Mr. Clarkin:

Q. What was your position with Sterlingwale?

A. It was the same as I mentioned before. I was president of the company.

Q. How long were you president of that company?

A. Oh, I don't recall the number of years. But it was —I really don't recall the number of years.

Q. More than 10 years?

A. Oh, I'd guess pretty close to that.

Q. Who was the president prior —

A. Prior to that, my father.

Q. Your father?

A. He was the founder of the company.

Q. What was his name?

A. His first name was Jack.

Q. Do you know when — well, it wasn't called Sterlingwale when he started it, was it?

A. No, it was not.

(p. 77) Q. Was it Sterling Pile Products—

A. No, it was not.

Q. What was the name of it?

A. It was called Jaed & Company.

Q. What?

A. Jaed & Company, J-a-e-d.

Q. When it was started, was it started at the location on Stevens Street, in Fall River?

A. If I can recall back to my grammar school days, I think that's the location it was started at.

Q. When did the name Sterling first come into play in any form?

A. I can't honestly say exactly how it came in; when it came in, whenever the state— it's a Rhode Island Corporation. Sterling Pile Fabrics is a Rhode Island corporation. So whatever's on file, the date it came on file.

But how it came about, I can't tell you.

Q. But is that name more than 20 years old?

A. Oh, sure.

Q. And at some point, Sterling Pile Products of Rhode Island—

A. Sterling Pile Products.

Q. Sterling Pile Fabrics — execuse me — of Rhode Island changed its name to Sterlingwale?

A. What we did is, we consolidated the corporations (p. 78) together.

Q. There were two corporations?

A. We consolidate the corporations together. There were three corporations.

Q. What were the names of those corporations?

A. One was Textiles, Incorporated. One was Textiles Export, Incorporation. And one was Sterling Pile Fabrics Corporation.

Q. Did all of those three corporations you just named operate out of the Stevens Street location in Fall River?

A. Yes, they did.

Q. And were the three companies merged at some point?

A. Yes.

Q. At the time of the merger, which of those companies had a contract with the United Textile Workers?

A. Sterling Pile Fabrics Corporation of Rhode Island, as the best of my recollection. That's the one that had the bargaining unit. That corporation was negotiating with the union.

Q. At the time—

A. Sterling Pile Fabrics Corporation was a contract finisher.

Q. And at the time of the merger, all three corporations became Sterlingwale or Sterlingwale Corporation?

A. That's correct.

(p. 79) Q. Who owned stock in Sterlingwale Corporation?

A. The Ansin family does.

Q. The Ansin family?

A. Correct.

Q. In February of 1982, who owned the stock in the Sterlingwale Corporation?

A. The Ansin family.

Q. Do you particularly—

A. The Ansin family. I own stock. I own stock in the corporation and have the controlling interest in the rest of the stock that I don't own.

Q. Who are the other stockholders in the family?

A. The other stockholders would be—you want to know by majority, minority?

Q. How many stockholders were there?

A. There must have been about seven or eight of them. All Ansin family.

Q. Going back 10 years, was that the same situation for those corporations?

A. No.

Q. No?

A. No.

Q. Going back five years, was all the stock held by members of the Ansin family?

A. Five years ago, yes, it was.

(p. 80) Q. Do you hold any position—have you ever held any position in Fall River Dyeing & Finishing Corp.?

A. No.

Q. Do you have any stock in the Fall River Dyeing & Finishing Corp.?

A. No, I don't.

Q. Do you have any financial interest, other than stock—a pecuniary interest of any sort—in Fall River Dyeing & Finishing Corp.?

A. I have none.

Q. To your knowledge, does any member of your family or any prior stockholder of Sterlingwale Corporation own any stock in Fall River Dyeing & Finishing Corp.?

A. I don't know.

Q. You don't know?

A. Don't know.

Q. It is likely if your mother owns stock in Fall River Dyeing & Finishing Corp., she would communicate that to you?

A. I really—I don't know. It never even entered my mind.

Q. You testified on direct examination about the difference between a converting operation in the textile industry and being a commission dye house, did you not? There is a difference, isn't there?

A. In the corporate structure? In the way the company is (p. 81) financed—

Q. Is there a difference in the way one operates a textile converting business from the way one operates a commission dye house business?

A. From whose point of view?

Q. Well, from your point of view.

A. From my point of view, as I was running the company?

Q. Yes.

A. From my outside policy to my customers, there's a policy for selling to my customers. For my policy as to how my employees do their job, it would be the same no matter who—no matter what was going through the plant.

Q. My question is this: is it not true that a converter in the textile industry is an individual or corporate entity, such as yourself, who goes out into the marketplace and actually purchases griege goods, unfinished textile goods? Is that correct?

A. That would be correct.

Q. And once he's purchased those goods, he then takes them to his dyeing and finishing plant, and processes those goods—cuts them, dyes them, finishes them. Is that correct?

A. That's—as long as you're using corduroy.

Q. And the third portion of the converters business, of course, is to go out into the marketplace and sell those goods that he has bought, dyed and finished, isn't it. He (p. 82) then retails them, doesn't he?

A. Correct.

Q. And I think you used the phrase, apparel manufacturers?

A. Correct.

Q. So to the extent that you conducted operations at Sterlingwale as a converter, you went out to the marketplace, you purchased griege goods, you dyed them, you finished them, then you sold them yourself to apparel manufacturers, didn't you?

A. Correct, corduroys.

Q. Now, conversely, a—

A. A converter—let's clarify a point.

Q. I'm sorry?

A. Could I clarify a point?

Q. Sure.

A. A converter does not necessarily just own inventory and sell fabric. There are converters in the industry who do own brick and mortar, similar to what we do—what I did.

Q. And you were a converter?

A. In the corduroy finisher, we're termed a converter.

Q. And did—

A. A converter owning machinery,

Q. In a commission dye house, on the other hand, is that not simply an individual or a corporation, a corporate enterprise, that simply takes orders from customers who own (p. 83) griege goods, who sees the goods as a balee, processes those goods according to the customer's specifications for an agreed-upon price and thereafter ships those goods ultimately to other third parties according to the customer's orders. Is that correct?

A. That's correct.

Q. Okay. Now, when you started with Sterlingwale, or whatever it was called as of that time, were you working—was your operation a converting operation or was it a commission dye house operation?

A. When I started?

Q. Yes.

A. Which era? I mentioned earlier that I started in the '50s part time, and was working full time in the '60s.

Q. At the time you took over as corporate president.

A. By the time I took over as corporate president, it was predominantly converting. We were doing commission finishing, but we were predominantly converting.

Q. Did you have any opinion, based upon your best recollection, of what percentage of your business—either in terms of yards of goods or in terms of—I guess yards of goods would be the best term—on a monthly or a yearly basis during your first year, were goods that you converted, as opposed to doing commission dye work?

A. Going back to the '60, that's a hard one to give an (p. 84) accurate answer on. It really is.

Q. But you were primarily a converter?

A. You mentioned '70s. In the 70's, we were primarily a converter. The early '60s, we may have been more commission finishing, as compared to converting.

But it's really hard to get—to put an estimate on it.

Q. So in the 70's, you were primarily a converter?

A. That's correct.

Q. Were you primarily a converter of a certain type of fabric.

A. Primarily, yes.

Q. What type of fabric was that?

A. Primarily corduroy.

Q. Is it fair to say that, during the decade of the '70s, that your company gained a certain reputation in the textile community, among apparel manufacturers, for corduroy?

A. That's right. Because there was a demand for corduroy.

Q. Is it fair to say that, in the marketplace, people associated the name Sterling with corduroy fabrics?

Mr. Redbord: Your Honor, I'm going to have to object, as to Mr. Ansin's conclusion as to what other people in the field believe.

Mr. Clarkin: I asked him about reputation in the marketplace.

Judge Kolko: I'll take his testimony on what he (p. 85) perceived his company, his own company's reputation was.

The Witness: We were known primarily for corduroys in the industry.

By Mr. Clarkin:

Q. Who was your competition at the time you were a corduroy converter?

A. Compton and Collins, Stevens, Greenwood, Dan River, Burlington—the the big, giant vertical mills on the New York Stock Exchange.

Q. Belboard—

A. Yeah, they were somewhat a converter—I mean, a competitor.

Now, there were some Japanese names, some Hong Kong names, there were some European names. Names all over the world, we were competitors.

Q. Now, you indicated, too, in 1979, you indicated your business experienced some—you characterized it as trouble?

A. Correct.

Q. And at that point, did you instigate a change in the ratio of goods that were being converted, as opposed to goods that you were doing commission dye work on, finishing work?

A. I started to lay some plans in 1979 because I saw that the export market, that we were heavily involved on —about a third of our business was exported out of the country—was getting hurt due to excess amount of exports from this (p. 86) country. And also due to the increasing value of the dollar.

By 19— the first quarter of 1980, we had totally lost our export market. That was part of the reason of the decline of our business, part of it.

And the same time, we tried— we tried for months and quarters and years, we tried to get that company to go—that plant to become attuned to doing other fabrics besides corduroys. Met a lot of resistance, and a lot of problems within the company.

Q. Did you attempt to get, starting in 1979, more involved with commission dye work?

A. We did. We attempted to, to a small extent. But we were still involved heavily in the export market and

heavily involved in this Mass Capital Corporation refinance. So that took a lot of my time.

Q. So 1979, When you first encountered economic difficulties because of the loss of the export market, until February of 1982 when you closed production operations down, is it fair to say that during that period you still remained primarily a converter?

A. Well, I would say for 1981— I don't really think I'd consider myself primarily a converter in 1981. Let's see. If I go back, the peak years, we were doing pretty close to 12-13 million yards a year, of converted fabric.

I went downhill, I would say in '81. We were probably —(p. 87) I'd be guessing, 50, 55, 45. Roughly, about that, approximately, in amount. 'Cause we still had to— we had old debts that had to be paid off. And the only way the old debt could be paid off was through converted fabric sales, not the commission finishing sales.

Q. Now, to the extent that you had customers as a converter, those customers would consist of people in the apparel trade, retailers, would they not?

A. Well, apparel trade meaning, apparel manufacturers. Retail trade is something else.

Q. I'm sorry.

A. Apparel manufacturers, correct.

Q. And to the extent that you operated as a commission dye house, your customers would be different, would they not?

A. Oh, yes.

Q. Your customers, in that case, would generally be other converters?

A. Correct. Some even competitors of ours.

Q. Okay. Now, did you also indicate on direct testimony that your feeling or the conclusion you reached at some point between 1979 and 1982 was that commission dyeing was not profitable enough for Sterling?

A. It was not a business that could maintain itself based on the structure we had in our company, if we were 100% commission finished.

(p. 88) Q. When did you reach that conclusion?

A. At the time the cost of money went above 7%.

Q. Do you recall when that was?

A. I think it was back in 19— '70 and '79. And the price of oil went from $18 to $32 a barrel, etc., etc. Other problems in our economy.

Q. So that after that point, to the extent that you began or you continued to do commission dyeing work; I assume, then, you did some only to fill in?

A. I did it to have— for the company to survive.

Q. Because you did not have enough converting—

A. There was not enough in volume. There was not enough volume there to cover our fixed expenses, certain fixed expenses.

I decided — and you recall my testimony — I decided that, at that time, we could have packed it in. And we decided not to. The Ansin family decided not to. I stated that before lunch.

Q. My memory is, too, that on direct examination, you also indicated that the 30th of November through February was traditionally a very slow period for corduroy. The market opened up again in March till sometime in October.

A. Primarily, yeah.

Now, let's classify that. There have been quarter mile records, yeah. But there have been years when we would go (p. 89) right through the— right through 12 months of the year when corduroy was really in demand.

Q. Well, in your last three years of operation, did you experience a slow down during that period—

A. On corduroys, generally yes.

Q. Now, you shut operations down here in February of 1982, did you not?

A. [No verbal response.]

Q. According to your testimony, that time would be right on the brink of an upsurge in corduroy?

A. Correct.

Q. Now, did—

A. I explained myself earlier about that. You want me to re-explain it? Why I shut it down?

Q. No. Let me ask a question.

My understanding is from direct testimony that the ultimate reason you shut down is that you did not have enough capital — is that correct?

A. Correct.

Q. And what did—

A. We ran short of cash.

Q. —was to go out into the marketplace and buy your own griege goods, your own corduroy, your own cloth I guess, to process as a converter?

A. We couldn't buy yard one in the market. We didn't have (p. 90) enough cash to buy yard one.

Q. I understand that. When you say you were short of capital and were unable to buy goods, the goods that you were referring to are— I guess it isn't corduroy when you buy it. What do you call it? Just cotton?

A. Griege goods.

Q. But I mean, cotton and polycotton?

A. Sure. But that's not the only thing that goes into making a plant. You have group insurance. We hadn't even paid our group insurance premium. Period.

Q. So the reason you stopped that operation was, you did not have the capital to continue on as a converter, because you couldn't buy goods?

A. We couldn't maintain an operation, period. We were losing money every month.

Q. Didn't you testify on direct examination that the reason you closed the business down was, you did bnot have enough capital to buy goods?

A. We didn't have enough capital to buy the goods. We had, prior to that, made an analysis. We had accountants come in to make an analysis of the company, to run it strictly as a commission finisher. And even as a commis-

sion finisher, we had gone through a bankruptcy; the bankruptcy court would not allow us to maintain that business.

Q. You made your own determination, then, that you could (p. 91) not make it as a commision dye house?

A. I had— with outside people having come in and advised us as to the prognosis of that plant, the way it was structured at that time. Based on paying normal wages.

Q. Now, did you have a retail operation at Sterling?

A. A retail operation, denoted where customers would come off the street and buy three yards or five yards — no, we did not.

Q. Did you have any other type of operation—

A. We had a fabric operation where we sold fabric to retail stores.

Q. You did?

A. Yes.

Q. Did you have people who were employed exclusive for that purpose?

A. Yes, we did.

Q. And that type of operation would be one of these associated exclusively with the converting operation, as oppossed to a commission dye house, would it not?

A. Well, an entrepreneur would, in a commission finishing house, could also take his excess inventory and have a retail department—

Q. How would a commission dye house amass an excess inventory, if it's processing goods of third parties?

A. If they— if a commission finisher uses a procedure (p. 92) where he does not return to the customer 100%; he returns his customer 95% of what had come— of what fabric had come in the door.

Q. So your—

A. Standard of the trade.

Q. Your answers is grounded in the hypothesis that a commissioner dyer could, if he were dishonest—

A. Not if he—

Q. —to a customer all of the goods that the customer had placed in his possession?

A. I did not say the word dishonest. Custom of the trade. A custom of the trade.

Q. It's a custom of the trade to shortchange parties who send goods in to be dyed and finished?

A. There's a custom of the trade amongst many of the commission finishers. There are some commission finishers that return 100— 100% of fabric.

Q. What do others do?

A. There are some that don't return 100%; they return 95%.

Q. How do they explain the 5% that's missing?

A. Custom of the trade. It's their policy to sell it that way.

Q. What do they do with that remaining 5%?

A. They go— they would take that fabric and they'd sell it in the second hand market.

(p. 93) Seconds?

A. In the second hand market. Some of it could be first quality; some of it could be seconds.

Q. It's not the type of retail operation you had at Sterling, is it?

A. We had— the retail operation that we had was a manner of getting rid of our seconds that was a fall out from our own converter fabric.

Q. How many people—

A. And we also—we also produced a line specific for carrying a retail fabric line. We bought fabric specific for that market.

Q. How many people were involved in the retail operation?

A. Excuse me?

Q. How many people were involved in the retail operation?

A. Three, four people, five people. I'd guess. I don't recall exactly. It would fluctuate, depending on the time of year.

At one time, the retail operation— retail fabric store business was a very big business. It fell off for a number of years. It's starting to come back in again.

Q. Now, these payroll summaries that you identified earlier, can you tell me what happened to those payroll

summaries, where they were stored, in whose possession they were, as of February 12?

(p. 94) A. They were in the possession of the corporation.

Q. Of Sterlingwale?

A. Yes, they were.

Q. And where were they physically located?

A. On the premises of Sterlingwale, 168 Stevens Street.

Q. Until what date, what time? Assuming that they're not there right now.

A. We both know they're not there right now.

Q. When were they moved?

A. Away from 168 Stevens Street?

Mr. Redford: Your Honor, I would object. I don't— the documents are already in evidence. We're not talking about authenticating something. And I don't see the purpose of the inquiry as to exactly what happened to them.

Mr. Clarkin: I'm going to lead into all of these records.

Judge Kolko: All right, we'll see where that leads us. Assuming that you're going to make some connection. But in terms of what just stated, I'm inclined to agree.

I'll overrule the objection.

The Witness: You said when were they moved?

Mr. Clarkin: Yes.

The Witness: Maybe in the last two, three weeks, four weeks.

By Mr. Clarkin:

(p. 95) Q. Prior to that, they were stored in what building down on Stevens Street?

A. From about the 1st of September on, they were stored in the green building.

Q. Did you retain all of your corporate business records and sales accounts, all the paperwork associated with this corporation?

A. Oh, I can't recall exactly. I ran a company of 215 people and we did $30 million a year of sales. I didn't know exactly, specifically every single detail of what went on, okay. So I can't tell you whether there are still records left intact inside the buildings of the old corporation.

Q. To the best of your knowledge—

A. We had an office manager at that time. She was in charge of doing all that.

Q. To the best of your knowledge, have all of the records of Sterlingwale Corporation, were they all at some point moved into the so-called green building?

A. All the key records were moved.

Q. Now, as to the buildings, during the time that you were president of Sterlingwale Corporation, you indicated that there were three buildings at a certain location on the east side of Stevens Street in Fall River that you operated your business out of. Is that correct?

A. That's correct.

(p. 96) Q. And I think we referred to buildings by colors, did we not?

A. There's a red building, a green building, and an office building.

Q. Would you agree with me that the green building is a metal fabricated building with approximately 50 to 60,000 square feet?

A. That's correct.

Q. And you did use that building?

A. Sterlingwale Corporation did use that building.

Q. You also indicated that you used that building for non-production purposes. Is that correct? There was warehousing there—

A. For receiving and holding of griege goods, and also holding of finished fabric.

Q. Didn't you do back sizing out there, too?

A. I mentioned that before, too.

Q. Did—you did do back—

A. Yes.

Q. Would you agree with me that back sizing is production?

A. For corduroy finishing, yes. On some styles; not all styles are necessary to be back sized.

Q. And you had back sizing machines out there, didn't you?

A. One back sizing machine.

Q. Now, the yellow building — would you agree with me, that (p. 97) was an office building located just inside the fence to the property, inside the gate?

A. [No verbal response.]

Q. And what did you utilize the yellow building for?

A. An office.

Q. So the remaining building is the red building, or the brick building. Right?

A. [No verbal response.]

Q. And was that your major production facility?

A. That was the production facility, correct.

Q. And it's my understanding — tell me if I'm correct — that title to all three of these buildings was with Sterlingwale?

A. The title to all three buildings?

Q. Yes.

A. No, that's not correct.

Q. Who was the owner of the red brick building?

A. I was the owner.

Q. You personally?

A. Yes.

Q. Who was the owner of the yellow building?

A. I was.

Q. All right. Who was the owner of the green building?

A. I was.

Q. And you also indicated on direct that this realty was (p. 98) subject to various mortgages?

A. First lien and a second lien, that's correct.

Q. Now, is it true that the green building was subject to a mortgage to Edward Capuono?

A. Correct.

Q. And that the red and yellow buildings — and I believe they constituted one parcel?

A. Right.

Q. —were under mortgage to your mother?

A. Right.

Q. Lila Ansin. And that there was a second mortgage to whom?

A. There was a second mortgage on the red building and the office building to major creditors. On the green building there was a second mortgage. And also the machinery, there was a second mortgage. That was, in essence, my personal guarantee for the creditors to continue granting us credit to maintain that business. That was the reason for the second—requesting a second lien. And that's why I gave it.

Q. And in the case of the green building—

A. It's important that you understand that.

Q. I'm not sure it is.

In the case of both the green building and the red and yellow building, is it true that the mortgage-holders foreclosed on those properties?

(p. 99) A. Correct.

Q. So that at some point, title to those properties passed from you to somebody else, to third parties?

A. Okay.

Q. You lost the land, didn't you?

A. Correct.

Q. The buildings?

A. Correct.

Q. And you didn't sell any of these buildings to Fall River Dyeing & Finishing, did you?

A. I guess— I'm not an attorney, so I couldn't tell you. But assuming that, since there was a foreclosure sale, no, I didn't.

Q. Now, during the time that you were president of Sterlingwale, did you have a bank that you used, a major bank.

A. Yes, there was.

Q. What bank was that?

A. Well, at one time, it was First National Bank of Boston, was our major bank. In essence, they were doing the factoring of our receivables.

We also used the Durfee Trust in Fall River.

Q. Which is a commercial bank?

A. Yes. For our checking account and payroll account and pension plan, too.

Q. What about insurance? You obviously maintained (p. 100) insurance on the building and employees and workmens compensation and so forth, didn't you?

A. Right, correct.

Q. Did you buy that through an insurance agency?

A. Which insurance?

Q. Take your choice. Fire insurance.

A. We went through an agency in Providence.

Q. Do you recall the name of the agency?

A. Insurance Underwriters.

Q. What about workmens compensation insurance?

A. Through Insurance Underwriters.

Q. What about group health insurance?

A. Insurance Underwriters had nothing to do with that. That was— that was through Mass Mutual.

Q. Massachusetts Mutual Insurance Company?

A. Yes.

Q. Did you maintain any other kind of insurance—

A. All the normal business insurance.

Q. Liability?

A. Customer goods, liability, fire insurance, etc.

Q. Where did you obtain those policies?

A. All those were bought through Insurance Underwriters.

Q. In Providence, Rhode Island?

A. Correct.

They were professionals in insurance in the textile (p. 101) field.

Q. In reviewing the list of customers — let me show you GC-10 here. On direct examination you did indicate there were several companies listed there that you used the word believe Sterlingwale had done business with. Is that correct?

A. That's correct.

Q. You mentioned Kaplan Products?

A. Correct.

Q. Did you—

A. I thought at one time, we had done work for Kaplan Products.

Q. Is it possible that the company did business with not Kaplan Products, but a company using the name Silverman Products owned by a Kaplan?

A. It's possible.

Q. Different company?

A. It's possible.

Q. You're not sure, though?

A. I'm not sure.

Q. Now, on—

A. But it only shows they did $12,000 worth of business, Kaplan Products. It's very small—

Q. I think I'll draw the conclusions from the exhibit Mr. Ansin.

Now, you also indicated Textile Buff and Wheel was a (p. 102) customer of Sterlingwale? Is that correct?

A. I thought— all right.

Q. Can you tell me what kind of business Sterlingwale did with Textile Buff and Wheel?

A. If it's the same company, they would have sold their pound goods, the rags.

Q. Are you sure that the business you did business with when you were president of Sterlingwale was not a company known as Textile Waste?

A. It's possible.

Q. So you're not sure about Textile Buff and Wheel?

A. But let me clarify a point. Many of these people have three and four different corporations with the same location. And they use one corporation for doing one part of the business, another corporation doing another part of business.

Q. And the names change?

A. I didn't say that just then. I said a businessman will have three or four different corporations, only for his own particular purposes—that he'll just use one corporation for one thing, another corporation for another thing.

Q. Didn't you testify before lunch that the names changed too?

A. Absolutely.

Q. Companies come and go, don't they?

A. In this business, yes.

(p. 103) Q. And it's oftentimes difficult to tell who you're dealing with from day to day?

A. That's for sure.

Q. And that's one of the reasons you use factors in this business?

A. That's—and you keep inventory to back up your receivable.

Q. It's difficult to chase people down?

A. That's correct.

Q. Now, Walla Company, W-a-l-l-a, you said you believe you did business with them?

A. I do believe it.

Q. What do you remember about that company? What kind of business did you do with them?

A. I honestly don't recall. You mean the type of fabric?

Q. Well, did you do commission dye work for them—

A. If I did anything, I believe I would have done commission finishing for them.

Q. If you did anything?

A. Yes.

Q. But you're not sure, again?

A. I'm not really positive.

Q. In the last one that you indicated you believe you might have done business with was Tilbury, T-i-l-b-u-r-y.

A. We sold them fabric.

(p. 104) Q. You sold them fabric?

A. Yes.

Q. So basically, when you say Tilbury, you did business with Tilbury, you did business with them because you were a converter?

A. Correct. We sold them fabric.

Q. You didn't do commission dye work for them?

A. Well, if I took the time and went back through my records, it's possible we may have done it. This goes back a couple of years.

Q. To the best of your knowledge, is there any connection between your corporation, Sterlingwale, and Fall River Dyeing & Finishing Corporation?

Mr. Redbord: Your Honor, I object. It's the conclusion of what we're doing here today.

Judge Kolko: Well, I think I would just as soon leave the inferences to be drawn, Mr. Clarkin. And I'm not sure if, on that question, this witness can help us.

Mr. Clarkin: I just wanted to make sure he's exhausted his memory, Judge. If there's anything at all that he wants to tell us.

Judge Kolko: Why don't you ask him that question, then?

Mr. Clarkin: Fine, I understand.

By Mr. Clarkin:

Q. How, directing your attention back to February 12, at (p. 105) the time you closed the operation down, did you instruct supervisors to deliver any kind of a message to your production employees that day?

A. No, we must have said something to them. We just don't let 'em go and say—without giving a kind of message.

Q. My understanding of your direct testimony is that, in the period from February 12 to July, when there was an assignment for the benefit of creditors, that basically what you tried to do would be, affect an orderly liquidation of your business. Is that correct?

A. Well, there were two things I tried to do. I tried to affect an orderly liquidation, be sure of all taxes, etc.; there's no liabilities up there. And all of our creditors had agreed to it.

And at the same time, I tried to resurrect the business by trying to find a partner out there to assist in financing and get the business back off the ground. And I did locate somebody.

Q. You did successfully liquidate the business?

A. Through an assignment.

Q. Do you recall attending any meetings with either local officials of the UTW, or specifically Mr. Lenehan, in the period after February 12, 1982?

A. Oh, yes, they came in the summers, saw me, that's correct.

(p. 106) Q. And do you recall when those meetings were held?

A. No, I don't.

Q. Do you recall the substance of those meetings? What was discussed?

A. They wanted the—they wanted—besides the group insurance, which I think was pretty well explained and under control, they wanted to know what was the future direction. And I explained to them my interest in trying to resurrect the plant, put the company back in the business and become an employer again in the city, 'cause we'd been an employer in the city for 30 years.

And I explained to them that I did find a partner out there who did want to become involved, a local Boston merchant. But for reasons beyond our control, there were parties outside my sphere of control that wouldn't allow it to happen.

Q. When was the last meeting you had with the UTW? Do you recall that?

A. Honestly, it had to be in the months of June, July. In that period.

Q. Prior to the assignment of—

A. Oh, it was prior to the assignment, yes, it was. The assignment was not in July; it was in September.

Q. And during the period from February 12 until July, did you maintain some people on the premises, some workers and supervisors?

(p. 107) A. Yes.

Q. Your testimony was you basically had them maintaining the building, shipping out remaining goods. Is that true?

A. And looking over the machinery. 'Cause that was the three main assets of the company.

Q. Did your corporation, to the best of your knowledge, forward dues to the UTW for work done by any union member after February 12?

A. Oh, I honestly don't recall.

Q. You don't recall?

A. No.

Mr. Clarkin: Thank you very much.

Judge Kolko: Redirect?

Mr. Redbord: Just one or two, Your Honor.

REDIRECT EXAMINATION

By Mr. Redbord:

Mr. Ansin, regarding what I think you called the retail part of Sterlingwale, during, say the last year and a half to two years of Sterlingwale, can you tell us what percentage of—I don't know—maybe total gross income or however you think a fair way to categorize what percentage of the entire operation was that retail part?

A. Take a guess—less than 5%.

Q. Now, let me clarify one or two things in my own mind. If you will, regardless of—in a period around 1981, say, (p. 108) regardless of what your intent was for the company for the future, in fact during that period in 1981, to the best of your recollection, what percentage of converter work and what percentage commission work was the company doing at that time?

A. In the year 1981, in units—units, not dollars, but in units—gee whiz—70% converter, 30% commission. 60% converter, 40% commission. I think it's about that percentagewise, unitswise.

Now, in dollars, it could be significantly different. Because when you sell a unit of converted fabric, you're going to include your griege goods cost, you have to include your dyeing and finishing cost and your fixed overhead and your selling expenses.

When you bill out a unit of commission finishing, that's very small in relation to billing out a unit of converted sales.

So if we had an average selling price of converted fabrics of maybe $3 a yard, we could have an average selling price on contract finishing of 40¢ a yard, 45¢ a yard. 'Cause all we did was add on to the value of the fabric. That's all we did. On commission finishing.

Q. Putting it not in dollars, but in percentage of—if you will, the percentage of time that employees spent doing their work and what they would be working on during their (p. 109) working day, is it possible for you to estimate it in that way what percentage is converter and what percent is commission in 1981?

A. Now, when you're talking about employees, you're talking about hourly employees within the manufacturing plant? Or office personnel?

Q. I'm talking about employees within the unit that was represented by the UTW at Sterlingwale.

A. It would depend on the fabric he's producing. But technically, it didn't make any difference to him whether

it was commission finishing fabric or a converter fabric. If it was corduroy, he'd spend just as much time on it, whether it be commission finishing or converter.

Q. And if it was flat goods?

A. He'd spend the same amount of hours and he would be running the fabric through basically the same equipment. So he'd be spending just as much time on flat goods as on—as on corduroy.

Mr. Redbord: Nothing further, Your Honor.

Mr. Clarkin: I have no further questions.

Judge Kolko: Very well, you're excused. Thank you.

(The witness was excused.)

Mr. Redbord: May I have one second, Your Honor?

Judge Kolko: Yes.

Let's be off the record.

(p. 110) (A short recess was taken.)

Judge Kolko: Back on the record.

Mr. Redbord: Mr. Rego?

Whereupon,

NORMAN REGO

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Redbord:

Q. Would you please identify yourself for the record?

A. Before I start, I got a cold, so it's going to be hard.

My name is Norman Rigo. I live in Fall River and I work for Fall River Dyeing & Finishing.

Judge Kolko: How do you spell your name, sir?

The Witness: R-e-g-o.

By Mr. Redbord:

Q. Are you appearing here today under a subpoena, sir?

A. Yes, I am.

Q. You're currently employed at the Fall River Dyeing & Finishing?

A. Yes.

Q. And what's your job there?

A. I'm a pad operator.

Q. How long have you been a pad operator at Fall River?

A. Well, since it opened up.

(p. 111) Q. About when—

A. October, I guess. Somewhere around that. September, October.

Q. Of last year?

A. Yes.

Q. Could you tell us basically, what are your job duties in that job description that you mentioned?

A. Well, I work with reactor dyes. I get the griege goods. I dye the roll and it goes onto the jigs. They wash it out. It goes to dry cans and goes to the inspection department, wherever it goes, and the finishing range.

Q. You operate a machine in the course—

A. Yes.

Q. Is there a name to that machine?

A. A pad, p-a-d.

Q. Were you ever employed by Sterlingwale?

A. Yes, I was.

Q. When were you employed at Sterlingwale? From when—

A. 1962 until 19— until it closed.

Q. Till 1982?

A. 1982. Twenty years.

Q. What was your job there at Sterlingwale?

A. I was a pad operator. When we closed, I was a pad operator.

Q. And you'd been a pad operator for while before the (p. 112) closing?

A. Well, approximately 10 years, I guess.

Q. And before that, what kind of jobs did you have?

A. Well, I ran the finish department and jigs, various jobs.

Q. How would you compare the type of work that you personally are doing now at Fall River with the type of

work that you were doing when you were at Sterlingwale in the last 10 years?

A. Similar, as far as I'm concerned.

Q. Would you say it's extremely similar, somewhat similar?

A. It's—you know, I'm—it's similar. I'm just dyeing rolls, you know, the same way I did before.

Q. Are there any differences between the two?

A. No, not really.

Q. Currently, on the pad machine you work on—

A. Yes.

Q. Do you know from your own personal knowledge where that machine was before it was in Fall River? At Fall River Dyeing & Fin—

A. Same place, yes. It's never been moved. It's in the same place. Same area.

Q. Is that the machine you operated at Sterlingwale?

A. Oh, I operated small machines, a small machine, the one in front of it. Now I operate the other one.

(p. 113) Okay, now I understand what you're saying. I operated a small pad; now I operate the ASISA pad, what they call the ASISA pad. It's still a pad, same, you know, type of operation. I make rolls for another machine, that's all.

Q. The small pad machine's the same machine from Sterlingwale also?

A. Yes.

Q. There are other machines that other people use at Sterlingwale—

A. Yes.

Q. In the course of your job at Fall River now, for any reason at all, do you often have occasion to move around the plant for any reason?

A. Yeah, I—yes.

Q. Do you have occasion to see the other machines that are at Fall River?

A. Yes.

Q. How would you compare the machines that are at Fall River Dyeing now with those of Sterlingwale?

A. Well, they're the same machines, as far as I'm concerned.

Q. Now, the—in the course of work, walking around the plant, have you had occesion to view other employees and what jobs they're doing?

A. Yes, I guess I would, yeah.

Q. Can you tell us, how would those jobs that the (p. 114) employees are doing now compare with the jobs that were being done at Sterlingwale?

A. They run the same way. Except some operations are different now.

Q. Which ones are different?

A. Well, like the dry can, before they had two men in the front. Now they have a man in the front, man in the back, which is different then what it was before.

Q. So the dry can, if I understand it, the only difference is that there used to be two men in the front, and now it's one in the front and one in the back?

A. Yes.

Q. What does that mean in terms of the operation?

A. Well, the man in the back takes all the parts out before it goes into the finish range. They never did that before. And he's like inspecting, I guess, if he sees anything wrong with it—which is a better procedure, really.

Q. The machines are the same or different from the machines at Sterlingwale?

A. Well, they may have added a couple of brushes, but you know, no big deal. Nothing big.

Q. You mean a couple brushes that—

A. In the front, yes.

Q. Do you—at Fall River, do you recognize at Fall River Dyeing people who were formerly employed by Sterlingwale?

(p. 115) A. Yes.

Q. Are there a lot of them that you recognize?

A. Well, there's a few, yes.

Q. How could you compare the jobs that those former Sterlingwale employees are doing now at Fall River with what was being done at Sterlingwale by those same employees?

A. Well, there's only a couple guys doing different jobs. The majority of them are doing the same job.

Q. What about the supervision at Fall River? Do you have occasion to view a number of supervisors in the course of moving around the plant—

A. Yes, I guess.

Q. How would you compare the supervision at Fall River with the supervision of Sterlingwale?

A. As far as I'm concerned, it's the same supervisors, the same people.

Q. What about the, if you will, the entirety of the production process? How would you compare the whole process that the material goes in, from beginning to end, at Fall River with that at Sterlingwale?

A. Same thing, I guess. Really.

Q. Now, you stated that you started, I believe, at Fall River in the fall of '82?

A. I was one of the first ones called back. It was September, October. To be honest with you, I can't—you know.

(p. 116) Q. Now, recall back to that time, if you will, and tell us how long after you first reported to work at Fall River did you start performing your regular job duties?

A. About four to six weeks. We cleaned up, first, when we went in.

Q. You cleaned up for a while?

A. Right.

Q. And is it your observations—would that be a fair statement—that that applied to other employees in the plant?

A. I guess so, yes. Not everybody was in anyway, so, you know—

Q. Did there ever come a time a second shift was put on, to your knowledge?

A. In my department?

Q. Okay, your department.

A. Yes, there's a second shift in my department.

Q. There's one now?

A. Yes.

Q. From your personal observations, do you have reason to believe when that second shift began?

A. It was a while after we started the first shift, naturally.

Q. Can you estimate for us how long after—

A. I'm just guessing. I'd say about three, four months (p. 117) after we got started, I guess. Six months. Five months. I don't know.

Q. Well, would you say, if you can recall, was it after Christmas?

A. I would guess, yes.

Q. And that period—four to six weeks, I believe you described it—after you started, when you were doing your regular job, from your observations, would you say that the—strike that. From your observations, how would you

describe the production process that the first shift was doing?

A. Well, they were working a lot of hours. It was slow at first. The machines had to be greased and everything. So in other words, there was a process until the machines go really going.

Q. Did it seem to you that, at that period, four to six weeks after, the production process was going through its normal cycle?

A. No, it was a while after that. I mean, till it really got full blast, I guess you'd call it.

Q. Full blast?

A. Yes

Q. Would you say it was running full blast before the second shift was hired?

A. Oh, definately yeah. Yeah.

(p. 118) Mr. Redbord: No futher questions.

Judge Kolko: Cross examine?

CROSS EXAMINATION

By Mr. Clarkin:

Q. Mr. Rego, you indicated in direct testimony that there was a difference in the dry can—

A. Yes.

Q. —operation?

A. Well, it's not a big difference. It's that they added brushes. That's all.

Q. You said it's a better procedure?

A. It is, yes. As far as I'm concerned.

Q. During the time you were employed by Sterlingwale, was there an inspection department?

A. Yes.

Q. As Sterlingwale—

A. Yes.

Q. —did they have inspection machines?

A. Yes.

Q. Does Fall River Dyeing & Finishing have inspection machines or an inspection department?

A. No more, no.

Mr. Redbord: I'm sorry. Was your answer no?

The Witness: No. They combined the two.

By Mr. Clarkin:

(p. 119) Q. When were you laid off by Sterlingwale?

A. February 12—

Q. Your last day of work.

A. —on a Friday, at 3:00.

Q. What kind of notice did you receive?

A. The boss approached me at quarter to 3:00 and said, Don't finish the roll; you're laid off until further notice.

Q. Did you ever go back to work for Sterlingwale?

A. No.

Q. Did you hold a union office then?

A. I was secretary of the union.

Q. The local, or—

A. Yes.

Q. You remember the local number?

A. 292.

Q. In that capacity, did you sign the contract between Sterlingwale and the union?

A. Yes, I did.

Q. You helped negotiate it?

A. Yes, I did.

Q. Have you held any union office prior to being secretary?

A. I was safety committee, but no—that was not an official capacity.

Q. When were you first selected for the office of secretary of the local?

(p. 120) A. I guess I was about nine years, I guess. Six years, nine years.

Q. Do you recall how many of your members were working on February 12 in your local? How many were employed by Sterlingwale?

A. No. To be honest with you, the exact numbers, no.

Q. More than 100?

A. Well, I would say so, yeah.

Q. More than 125?

A. I'd say about 150, I guess.

Q. That's 150 people?

A. I could be wrong. I'm just saying 150 people.

Q. You'd been employed by Sterlingwale for some time prior to 1982. Do you recall in 1979 how many employees Sterlingwale had?

A. Exact figures, I couldn't tell you, no.

Q. Was it higher than the number you had i..—

A. I know one time we employed about 200 people. But what it was in '79 or '75 or '76, I don't know.

Q. In February of 1982, did Sterling just operate one shift?

A. No. We had two shifts, three shifts.

Q. Three shifts?

A. Right.

Q. Fall River Dyeing & Finishing, do they have a (p. 121) third shift now?

A. No, not to my knowledge. Not—let me think about that before I answer.

Dye house, no. Second floor, no. As far as I know, the third floor, they work overtime but it's not considered a third shift.

Q. So basically, it's a two shift operation?

A. Yes.

Q. And you're uncertain of when the second shift commenced?

A. Right.

Q. Do you have any idea of when the second shift was filled out and became a full shift?

A. Could you rephrase that, please?

Q. Do you know when the second shift was filled out, when all the hiring was completed for the full second shift? That's at Fall River Dyeing.

A. Or, exactly, no. The exact date, no.

Q. You indicated that since you began your employment with Fall River Dyeing & Finishing, apparently you have some knowledge of their operations and employees, walking through the plant--

A. Yes.

Q. Have you had conversations with your fellow employees about the types of jobs they're doing?

A. Yes.

(p. 122) Q. You have?

A. I would say yes.

Q. So in answer to my learned colleague's question, with people who are doing the same jobs, you're basing that upon your conversations with them?

A. With people I know, yes.

Q. Do you understand why we're here today?

Mr. Redbord: I would object, Your Honor.

Judge Kolko: Not necessarily, Mr. Redbord. It's part of the give and take of cross exemination.

Overruled.

By Mr. Clarkin:

Q. Do you understand why we're here today, Mr. Rego?

A. As far as I know, the union's trying to get back into the plant. That's what I assume.

Q. You're a former union official?

A. Yes.

Q. You want this union back?

Mr. Redbord: Objection, Your Honor.

Judge Kolko: Overruled.

The Witness: I can answer?

Mr. Clarkin: Yes.

The Witness: My honest opinion, as far as I am concerned, it doesn't make no difference. I'll tell you the truth—and I'll say to Jimmy Lenehan right here—the people have asked (p. 123) to represent 'em. And I went to see Herby Chace for a raise. And Herby Chace said that he didn't want to give me an answer. So I assumed—so I went back to the people and I said, I don't know; I guess it's going to take until May 2 till we find out if we're going to get a raise or not.

So they asked me to make a petition for 'em. And I went around asking everybody if they wanted the union back. And the reason they—with Tony Cobral and others, they said because they didn't get their vacation pays, they don't want the union back. And that's the God's-honest truth.

Mr. Redbord: Your Honor, I would object and move to strike the subjective oninions of people involved, to the extent that they're related through hearsay.

But even notwithstanding that, they're irrelevant.

Judge Kolko: Well, it's hearsay. I'm not sure I'm going to give it much weight. I'm not going to strike it. But the question asked of the witness was, Do you want the union back?, and what we got was some additional information. I'm not sure I'm going to give much weight to it, other than the direct answer to the question.

I just have a reluctance to start crossing things out, Mr. Redbord, but I've indicated to you my feeling.

Mr. Redbord: Thank you, Your Honor.

By Mr. Clarkin:

Q. Mr. Rego, you know Mr. Chace?

(p. 124) A. Yes.

Q. What's his job at Fall River Dyeing?

A. I don't know. I guess he's—

Q. Boss?

A. Boss, I guess, yeah.

Q. Do you recall him working for Sterlingwale?

A. Yes.

Q. He was an employee like you were?

A. Yes.

Q. Did you have occasion a couple of weeks ago, in the company of two other of your employees, to go to his office?

A. Yes, I did. I just stated that.

Q. Who was with you that day?

A. A fellow named Albernaz, second floor. And a guy named Cadero on the third floor.

Q. What did you say to Mr. Chace that day?

A. The people wanted to know what was going on. We—you know, since we started there, we hadn't got a raise. So we figured it's because things are going on. So we wanted—there was a rumor going around that April 1 we were going to get a raise. And we never received one.

So on the first floor, about 18 guys wanted to go upstairs to Herby's office. So I said, Look, I'll go myself. And they'd back me up; if I was going to get fired, they would back me up. They said they would back me up to a man.

(p. 125) So I went with Herby—I went with Albernaz and Cadero, knocked on his door, and he couldn't give me an answer. So we left, and I went back down the dye house and I told the guys what was going on.

So they asked me—and this is the God's-honest truth; I wouldn't lie—they said to me if I would sign a—get a paper to go around, 'cause I was going to come up here.

They knew I was subpoenaed because I had told 'em I was subpoenaed to come up here.

In fact, there was about four other guys subpoenaed and I guess never got a subpoena.

And Mr. Boardman called me up on a Wednesday and explained to me. And I told him I didn't want to jeopardize my job because, you know, I was working now.

So then Jimmy Lenehan called me up on a Thursday and we talked.

Friday, Mr. Boardman called me up again. He said he was going to subpoena me.

I said I would appreciate it if he would subpoena me because I didn't want to, you know—.

Q. I'm going to ask you to identify that.

A. That's the paper I wrote.

Q. Have you seen it before?

A. Yes.

Q. When did you first see that?

(p. 126) A. Well, the guys asked me to write something out on a Friday. I wrote it out. And then I went to the guys. I went with three papers: I went with the new employees; I went with the guys that wanted to go with the union.

Q. Have you ever seen that before?

A. Yeah. These are for the new employees at Fall River Dyeing & Finishing.

Q. Did you write the language contained in the preface to both of those documents?

A. Yes, I wrote it. And they wanted me to add this part here, which I did.

Q. What did you do with that? Did you walk around the plant with that?

A. Yes, I did. I went my department, had it signed. I worked on the second floor anyways, so I had the guys sign it on the second floor. I had everybody sign it.

Q. Did everybody there sign in your presence?

A. Yes.

Q. Do you know all these signatures there? Did you see them sign it?

A. I know the guys that—pardon?

Q. Were they all production employees?

A. Yes.

Q. And how many names are on those lists?

A. I never counted them. Well, there's a figure right (p. 127) here.

Q. What did you do with these lists of yours?

A. Well, I told—I made a copy of it and I left it on Herby's—in Herby Chace's office when I took the inventory.

Q. Who did you give it to in Mr. Chace's office?

A. I left it on the table, on his desk.

Q. In an envelope?

A. Yes.

Q. And did it have anything on it?

A. Pardon?

Q. Did it have anything on it?

A. Have anything on it?

Q. A name or anything?

A. No. I just left it there.

Q. When did you do this?

A. On a Friday. This past Friday.

Q. Your name on here?

A. No, I didn't sign it.

I want to say it again, if I can. They said it's nothing to do with Tony Cobral, because Tony Cobral is a good representative of the union. I don't think it's anything to do with Jimmy Lenehan.

It's just that they felt that they never got their vacation pay. It was because of the International. That's the reason they gave.

(p. 128) Mr. Clarkin: I'm going to move to introduce these. These Employer exhibits 1 and 2.

Judge Kolko: Those are two separate documents?

Mr. Clarkin: Yes.

Judge Kolko: We'll call them R-1 and R-2.

(The documents above-referred to were marked Respondent's Exhibits Nos. 1 & 2 for identification.)

Judge Kolko: Okay, fine.

Mr. Clarkin: For purposes of identification, please, could R-1 be the petition supposedly signed by former Sterlingwale employees, and R-2 the non—the new employees?

Judge Kolko: Repeat that again for me, please.

Mr. Clarkin: R-1, the caption would indicate, was signed by employees of Fall River Dyeing & Finishing who were former Sterlingwale employees. And R-2 is a similar petition and the caption indicates it was signed by new employees, people who were not previously employed.

Judge Kolko: Thank you.

Mr. Redbord: Can I have some voir dire on these?

Judge Kolko: All we've done is identified them.

Have you moved for their admission?

Mr. Clarkin: Yes, I have.

Judge Kolko: All right, let's voir dire.

Mr. Redbord: Thank you.

(p. 129) VOIR DIRE EXAMINATION

By Mr. Redbord:

Q. Mr. Rego, I just want to make sure I understand a few things. Now, did you circulate these petitions at the same time, on the same day?

A. I went—this was this past Friday. I went 'round with the guys.

Q. Last Friday?

A. This Friday past, yes.

Q. All the signatures that appear on both documents you got last Friday?

A. Yes.

Q. Now, did you have both of them with you as you were walking around?

A. I had—yes.

Q. The two different-labeled petitions?

A. 'Cause I know who the people who were the old people, and I knew who were the new people.

I didn't force anybody to sign it. Just if they wanted to sign it, they'd sign.

Q. You wrote this out, what appears on each of the tops? You wrote it out?

A. I wrote it out, yes.

Q. You went up to each employee and asked them if they wanted to sign?

(p. 130) A. First—no. Let me explain myself. They knew I was being subpoenaed—

Q. When you say they, who do you mean?

A. The whole shop knew I was being subpoenaed. Everybody knew. In fact, they was telling me I was going to jail.

Anyway, they asked me, What are we going to do? Are we going to get a raise or not?

So I said, Well, let's make a petition. What are we going to do? We're going to get a raise or not—so they asked, All right, let's sign the papers that, you know, about the union.

They knew that it was about the union coming back in here. And I guess they don't want to have the union back, and as far as I'm concerned it makes no difference to me. Really.

Q. Let me see if I understand you. When everybody knew that you would be coming up here—

A. That I was being subpoenaed, right.

Q. —and everybody wanted a raise—

A. Yes. They figured April 1, they were supposed to get a raise. There was a rumor going around.

Q. There was no raise?

A. There was no raise, no.

Q. And everybody thought they were due for one?

A. Oh, yes.

(p. 131) Q. Everybody wanted a raise?

A. Everybody wants a raise.

Q. And then you went around with these?

A. This past Friday, because I was coming up here on Monday.

Q. Was it your idea to do this?

A. The people in the dye house wanted it.

Q. The people in the dye house?

A. Right . So I started in the dye house, as you can see.

Q. And do I understand you to say that the people in the dye house wanted a raise?

A. Everybody wants a raise.

Q. And the people in the dye house asked you to put this together because they wanted a raise?

A. No. They said to me—they knew I was coming up here Monday. And they knew it was about the union getting back in there. So I guess, whatever it was about, they didn't like it. They put on the bottom there—

Q. I'm sorry. Whatever what?

A. Right here. That's what they wanted stipulated, right here.

Judge Kolko: Mr. Rego, let's take it by the numbers. Where did the yellow piece of paper come from? How did it come into your hands? And who put the first words on it?

The Witness: I wrote the whole thing. The yellow paper, (p. 132) we got this in the files.

Judge Kolko: And who suggested to you that you start writing that?

The Witness: The people in the dye house.

Judge Kolko: Give me a name. The first person.

The Witness: Various people. Gilly Gabral. Sonny Bettencourt. They're right there.

By Mr. Redbord:

Q. Now, do I understand you to say that, at the same time that people were suggesting that you do this, that you write these papers, you were also talking about a raise?

A. They said—

Q. Excuse me. Before you wrote the papers, at the time people in the dye house were asking you to do this, were you also talking about a raise?

A. Yes. We wanted more money, right.

Q. And I understand that, at some point, you went to Mr. Chace to ask for a raise?

A. Yes, I did.

Q. When was that in reference to—

A. This is about two weeks before that.

Q. Two weeks before—

A. A week, two weeks before, yes.

Q. At that time, Mr. Chace indicated that there couldn't be any raise at that time?

(p. 133) A. He didn't—he didn't say one way or the other. But we assumed it was because of May 2 was coming up, I guess. You know, he wanted to know how things were going to go.

So I went back down the dye house and explained to the guys, you know, that we weren't going to get a raise till the court was over, May 2. Right?

So Friday morning when I went to work, the guys are saying to me, You're going to go to be subpoenaed. You know, what are we going to do?

So I went to the—to see the guys. I said, What do you want to do? In the dye house. So I said, Let's make a paper out. And I wrote it down right there. But they didn't—they wanted me to write this other piece down.

Q. When you say this other piece—

A. What is said—

Q. —you're talking about the part that says, we wish to be—

A. —treated fair with respect to wages and holidays, other benefits.

Q. Just one thing I'm confused about. What time of day was this when the people in the dye house asked you to bring something with you?

A. See, when I was in the dye house, I go work on dyes. So it was about 12:30, right after lunch.

They know I was coming up here, so they said, What are (p. 134) you going to say?

I said, I don't know what I'm going to say.

Well, they know it's 'cause the union wants to get back in. Like I said, it's no reflection on Tony Cobral and Jimmy Lenehan.

Q. It's okay; don't worry about it.

A. They never got their vacation pay. They figured the International—the people on salary or the foremen there got their vacation pay, and we never got any of ours.

Q. Were they talking about raises at that same time?

A. Yes.

Q. And people were upset about the fact that they didn't get the raise at the time they asked you to make this out?

A. Right. That was referring about the two weeks ago, when they were saying, you know, we never got a raise. Because they wanted to know what was going to happen May 2.

Q. So you're saying that people wanted the raise?

A. Yes.

Q. And they were told the fact that—

A. No.

Q. —the fact that there was a hearing, they couldn't get the raise because of the hearing. Is that correct?

A. Well, we assumed that, right, yes.

Q. And so then, the hearing was preventing people from getting the raise, you decided to make up this petition. Is (p. 135) that correct?

A. I—if you want to base it that way, I guess.

Q. Well, is that how you would base it?

A. Well, they wanted a raise and they didn't want the union back, as far as I'm concerned. I mean, that's what they're telling me.

Q. Well, they knew they couldn't get a raise; they were operating under the impression they couldn't get a raise because of the hearing May 2. Right?

A. Right.

Q. And that the only way to get the raise is—

A. I guess what you're saying is true. That's what they were thinking, right.

Q. By the way, did you put this number on here?

A. No, I didn't.

Q. Do you have any idea who did?

A. Well, you must—Herby Chace must have, I guess.

Q. Did you see him?

A. No, he wasn't in this week.

Q. Did you give Mr. Chace an original or a copy of these papers?

A. That's the original right there.

Q. I understand that. Which did you give to Mr. Chace?

A. Both papers. I gave him that paper and the other paper.

Q. The originals?

(p. 136) A. That's the originals. That's the only paper there was.

Q. Oh, I'm sorry. I thought I understood you to say you made a copy—

A. I got—yeah. I got a copy of the other one.

Q. Oh, you kept the copy?

A. Right. I gave him the originals.

Q. And this was Friday afternoon?

A. Yes.

Q. And to your knowledge, was there any similar petition to this, prior to Friday?

A. Not that I know of, no. Not by me, anyway, no.

END VOIR DIRE EXAMINATION

Mr. Redbord: Your Honor, I would object to the introduction of these on a number of grounds.

Judge Kolko: You may argue.

Mr. Redbord: First of all, Your Honor, and primarily, I guess—well, first of all, the charge in this case and the complaint which is based upon the charge alleges successorship and a failure to bargain at the time that the Respondent became the successor.

The good faith doubt, based on objective considerations which Respondent, I understand, is claiming here, has to be directed to the time period around which the demand was made. Accordingly, this having been made last Friday, it's irrelevant to the question of a good faith doubt based on objective (p. 137) considerations.

Judge Kolko: Well, that's the problem I've been having with that document. If it had a different date on it, you might not be making that argument and I might not be harboring my doubt.

Let's hear from Counsel for the Respondent on that. We may not have to go any further.

What's the relevancy on that, Mr. Clarkin?

Mr. Clarkin: Well, there's going to be further evidence in the form of testimony from Mr. Chace as to the good faith doubt as to the union's majority status.

I think that, in the least, the introduction of that petition is going to be corroborative of testimony that he's going to give here today about the feelings of employees

at Fall River Dyeing & Finishing from the day they opened the doors down there.

Judge Kolko: Well, let us assume arguendo for purposes of this discussion, that that petition reflects employees' sentiment from day one of Fall River's operation. All right, having assumed that arguendo—putting that out of the picture—I still have a problem with that petition because it's last Friday.

It adds some chain of continuum to the fact that, from day one up to—at least on day one and on last Friday, employees so felt. But last Friday is irrelevant.

(p. 138) Other than as some evidence, if it can be linked backwards—and from what you're telling me, you don't feel you've got to do that. And if you do have to do that, I'm not sure you've got much of a case. So I really don't feel that we're at all helped, from a relevance point of view, with that document.

I mean, it's all very interesting. And as I say, if it had a different date on it, it might be darn relevant. But as it sits there right now, I really can't feel that I can put it to any use.

If I cite that in a decision, and I were writing execptions to my decision, I'd pick that one as the first.

Mr. Clarkin: With all due respect to the Court, my understanding of the position is clear; I read the cases. And I'm not going to withdraw my attempt to have that introduced.

It seems to me, as I read the cases, a number of them anyway, they talk about successorship hearing—which is the start here today, the initial skirmish—which involve

the rights of three different classes of parties: involve the rights of the new employer, the old employees and the new employees.

It seems to me from the particular facts of this case that we're spending a great deal of time—and I don't want to argue with the logic you've set forth here—

(p. 139) Judge Kolko: Oh, I understand.

Mr. Clarkin: We're spending a great deal of time on the union's rights and, to some extent, the new employee's rights. But I think it's clear from the evidence that you've got 105 to 110 people down there whose fate is going to be decided, to some extent, here today on the basis of this testimony.

Well, it seems to me, when I first saw that document over the weekend, as I looked at it, I mean, my opinion might have been the same as Your Honor's.

But I also saw it as a feeble attempt by some people who are untrained in the law to have a voice in a proceeding that they probably don't understand, but they knew was going to take place here today. And to the extent that that represents some attempt by those people to have a voice in this proceeding—and my understanding of the National Labor Relations Act—and I don't mean to make a speech here—is that the major motivation behind it is to allow a working man, like Norman Rego and the other people that signed that petition, to decide who bargains over their hours and wages and so on. And to also determine if they don't want somebody to bargain for them.

It seems clear to me his testimony, and the inferences that at least I'm able to draw from testimony, former employees of Sterlingwale who lost their jobs in February of

1982 were (p. 140) less than ecstatic with the efforts of their union-- however much of a good faith effort they may have made—to obtain for them certain things: vacation pay, severance pay, and a breach of contract by the employer. They had to pay their own insurance if they wanted to cover their families.

I see that as the underlying reason. I see that as the reason that the employees came to him, a former union official, and asked him to do something; to be the spokesman.

He came up here today. This was the testimony as to how he got hold of it.

But it's here. And to the extent it's here, I mean, Your Honor can stand there; the National Labor Relations Board can stand there; perhaps the Circuit Court at some point is going to stand there and say, This is irrelevant to the charge. We don't care what the employees think. As of a certain date, we didn't have this petition. Therefore, the petition of these employees, how many names on there—a number, 89 or something—is irrelevant.

If that's the case, so be it.

If you're going to refuse to admit it, just note my exception on the record.

Judge Kolko: Well, if you so wish, we will let it accompany the record as an offer of proof, since you have so proffered it. So you do wish?

Mr. Clarkin: Yes.

(p. 141) Judge Kolko: Very well, let the Reporter note that the Exhibits R-1 and R-2 are not received, but are to accompany the record as Respondent's offer of proof, as so indicated by Counsel.

(The documents above-referred to, heretofore marked Respondent's Exhibits Nos. 1 & 2 for identification, were rejected.)

Judge Kolko: Okay, so the exhibits, R-1 and R-2, are in the rejected exhibits file.

You may proceed, Mr. Clarkin.

Let's take a five minute recess at this point. Off the record.

(short recess was taken.)

Judge Kolko: On the record.

Go ahead, Mr. Clarkin.

CROSS EXAMINATION (Resumed)

By Mr. Clarkin:

Mr. Rego, go back to the time you were initially hired, back in sometime in early October of 1982. You indicated you had occasion to travel the plant and talk to other employees, and observe them, and so on and so forth.

Did the employees express their opinions to you at that time about the United Textile Workers representing them at Fall River Dyeing?

(p. 142) A. In September, you're talking about?

Q. September.

A. To be honest with you, no. No, they didn't.

Q. Did you ever have any discussions with any of your fellow employees about the UTW representing them, in October or November?

Mr. Redbord: Your Honor, I would object. I may be objecting to the question which is about to happen after this. But I would object because I think this one is both calling for hearsay and is otherwise irrelevant.

Judge Kolko: Well, I'll overrule the objection. Let's see where it takes us.

Go on, ask him again, Mr. Clarkin.

By Mr. Clarkin:

Q. During the period, say, October/November of 1982, did you have occasion to discuss United Textile Workers with some of your fellow employees at Fall River Dyeing and Finishing?

A. No, it never was brought up. You know, we never thought the union was going to come back. To be honest with you, no.

Q. You never thought it was going to come back?

A. No.

Q. During the period December and January—December of 1982 and January of 1983—do you remember having any discussions with your fellow employees at Fall Dyeing & (p. 143) Finishing—

Mr. Redbord: Your Honor, the same objection. I guess it's a standing objection.

Judge Kolko: All right, we'll note your standing objection. Overruled.

By Mr. Clarkin:

Q. —relative to the United Textile Workers?

A. Not to my relection [sic], no.

Q. When did you first have discussions with fellow employees about United Textile Workers coming back?

A. When they started talking about getting raises.

Q. When was that?

A. Well, we thonght—first we thought we were going to get it April 1. We thought we were going to get one in March, too. But then April 1 came. The rumor was around that we were going to get one April 1.

Q. During the time when you were first hired, in September or October of '82, did you ever have occasion—prior to the instance that you talked about—to go to either Mr. Chace, or foremen, or anybody in management down there and indicate to them you or some of your fellow employees wanted the UTW to be recognized?

A. No, not that I know of.

Q. Have you ever gone to any of these people and ask why they didn't sit down and bargain a contract with the UTW?

(p. 144) A. The only thing—that's what I wanted to say before. The impression I get or the understanding I get with this is, this could go on for three years. Because I understand it if the union wins, the company is going to appeal. And if the company wins, the union is going to appeal. And the guys think they're not going to get a raise for three years. We may—we have ignorance of the law, but that's what we feel.

Q. You mentioned vacation pay?

A. Yes.

Q. In February of 1982 when Sterlingwale closed, were you entitled to vacation pay?

A. I hope so, yeah. Yes.

Q. How many weeks?

A. Me, four weeks.

Q. Did you receive it?

A. No.

Q. Were you also covered by the group medical insurance plan—

A. No.

Q. —at Sterlingwale?

Were you supposed to be covered?

A. Yes, I was.

Q. Since you worked for the first quarter of 1982—

A. No, we didn't know about it, anything about it, till (p.145) we closed up.

Q. Did you receive any severance pay?

A. No.

Q. Did you participate in discussions with Mr. Ansin—

A. Yes, I did.

Q. —and the union—

A. Yes, I did.

Q. —about getting vacation pay and severance pay?

A. Well, we talked about different things, yes. About opening up. In fact, we even went to see a lawyer, you know, to see if we could get some kind of a case and pay us.

Q. Did you have discussions with your fellow employees at Sterlingwale who'd been laid off about severance pay and vacation pay?

A. We had a meeting, I guess, you know.

Q. You had a meeting?

A. I believe so, yes.

Q. The employees got angry?

Mr. Redbord: Your Honor, I would object to his characterization of what other employees were saying.

I would also just like to point out for the record that I continue to have a standing objection to the inquiry, the entire inquiry regarding employees feelings and so on—whether Counsel calls for it by way of this witness's impressions or what somebody else—

(p. 146) Judge Kolko: I'm beginning to be of the same mind as you, Mr. Redbord. I'll sustain the objection to the question.

Mr. Clarkin: I have no further questions. Thank you.

Judge Kolko: Redirect?

Mr. Redbord: Just one or two.

REDIRECT EXAMINATION

By Mr. Redbord:

Q. Perhaps it's obvious, Mr. Rego, but perhaps it isn't, in answering a question from Mr. Clarkin I believe at one point you said something—you indicated that Mr. Chace was an employee, just like you, at Sterlingwale. Was that actually true? Was he not—

A. Well, he was vice president, yeah, I guess—

Q. Was Mr. Chace a production employee at Sterlingwale? Or did he have a management—

A. Yeah, it was a salary.

Q. Now you also mentioned something about the inspection department being combined at Fall River?

A. Yes.

Q. I didn't understand exactly what you were saying. What do you mean when you say the inspection department is combined compared to what was happening at Sterlingwale?

A. Well, before—

Q. When you say before, you mean Sterlingwale?

A. Sterlingwale, yeah. The inspection department was on (p. 147) the first floor and the tubing department was on the second floor.

Q. And now at Fall River—

A. Now they put the inspection department and the tubing department, combined it. One guy's doing two jobs.

Q. And what floor is it located on?

A. Second floor.

Q. Mr. Rego, do you happen to know if at Sterlingwale there were also employees doing combined inspection and tubing? Some employees?

A. I guess there would be, yes.

Mr. Redbord: No further questions.

Judge Kolko: Anything further?

Mr. Clarkin: I have no further questions.

Judge Kolko: Okay, you're excused. Thank you, Mr. Rego.

(The witness was excused.)

Mr. Redbord: May I just have one second to make a decision as to where we are?

Judge Kolko: By all means.

Mr. Redbord: General Counsel has no more witnesses to call at this time, Your Honor.

Judge Kolko: Very well.

Mr. Clarkin: The Respondent would call Herbert Chace, Your Honor.

(p. 148) Whereupon,

HERBERT CHACE

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Clarkin:

Q. Would you tell us your name and address, please?

A. Herbert Chace, 73 Elm Street, Swansea, Mass.

Q. How old are you, Mr. Chace?

A. Forty-nine

Q. Where were you born?

A. Swansea, Mass.

Q. Could you give us a summary of your educational background?

A. Educated in the Swansea Public Schools, through high school.

Q. Do you have any education beyond high school?

A. No.

Q. Could you give us your job—your employment history? After your graduation from—

A. After I graduated from high school, I was employed by Tigron Latex and Chemical Corp. I did lab work.

Q. How long were you so employed?

A. About a couple of years. And then things got slow, and then I was employed by Sterling Pile Fabrics, I believe at (p. 149) the end of '55, beginning of '56.

Q. Were you continuously employed by Sterling Pile and/or Sterlingwale Corporation till it ceased operations?

A. That's correct, yes.

Q. And do you remember the last date that you were actually employed by Sterlingwale?

A. I severed relations, I would say, the end of February, 1982.

Q. And did you hold a particular position with that corporation at that time?

A. I was vice president.

Q. What did you do as vice president?

A. The overall selling, getting sales, and plant operations.

Q. So you had a total work experience of approximately 27—

A. Twenty seven years, yes.

Q. —years at Sterlingwale?

During that entire 27 years, were the production and maintenance employees of Sterlingwale represented by the UTW?

A. Yes, they were.

Q. And did you on occasion during your tenure with Sterlingwale Corporation participate in collective bargaining—

A. I did at some—

Q. —and grievance and what have you?

A. During the span of the years, I did, at some time, yes.

Q. Were you involved actively in collective bargaining and (p. 150) the grievance machinery in 1982 and 1981?

A. No.

Q. Who was that handled by?

A. That was handled by Leonard Ansin and plant manager Fred Canuel.

Q. Do you know who the officers of Sterlingwale Corporation were?

A. Yes.

Q. Who were they?

A. Leonard Ansin was president, I was vice president, I believe Jane Ansin was secretary-treasurer.

Q. She's the wife of Leonard Ansin?

A. Yes.

Q. Was there a clerk?

A. I believe it was Leonard's mother, Lila Ansin.

Q. Can you tell me who the officers of Fall River Dyeing & Finishing are?

A. Art Freedman is president. I hold the title of executive vice president and secretary, and Art Freedman is treasurer.

Q. Did Arthur Freedman every serve as an officer of Sterlingwale Corporation?

A. No.

Q. How were you notified that you no longer were employed by Sterlingwale?

A. How was I notified?

(p. 151) Q. Yes, that you were all through.

A. I left the company on my own.

Q. Do you recall what date?

A. It was the end of February.

Q. And did you seek employment elsewhere?

A. I was hired elsewhere.

Q. By whom?

A. Velcord Southern. Our competitor.

Q. Where were they located?

A. In Lumberton, North Carolina.

Q. What did you do for them?

A. I took up the position of sales in New York City, representing Velcord Southern.

Q. How long were you so employed with Velcord Southern?

A. Until the beginning of Fall River Dyeing & Finishing, which was mid-September.

Q. You heard Mr. Ansin testify earlier today?

A. Yes.

Q. Was Mr. Ansin employed or active in Sterlingwale Corporation during all of the 27 years that you'd worked there?

A. No.

Q. When you first worked there, who ran that corporation?

A. Jacob Ansin, Leonard's dad.

Q. His dad?

A. Yes.

(p. 152) Q. And during the first few years that you worked there, what basically was the product of Sterling–

A. It was corduroy dyeing and finishing.

Q. Were they converting then, or were they doing commission dye work?

A. They were strictly commission dyeing at the beginning.

Q. At some point, to the best of your recollection, was there a change of Sterling Corporation from commission dyeing to almost exclusively converting?

A. Yes.

Q. Do you recall when, approximately, that occurred?

A. It had to be about eight to ten years ago, where they felt that the commission end of it wasn't profitable. And Leonard felt, when he was in in the transition of father/son, he felt that he could make a viable go of being a converter.

Q. And during theat period—eight to ten years ago, you said—how many employees were there in Sterling?

A. Upwards in the 200 plus.

Q. Do you agree with Mr. Ansin's testimony that commencing in about 1979, business changed for the worse?

A. Yes.

Q. And do you have any recollection of the history of employee levels during the period 1979 to February, 1982? The number of employees.

A. They just kept dwindling.

(p. 153) Q. Did they dwindle as a result of dwindling business on the part of Sterling?

A. Yes.

Q. Is it fair to characterize the period of '79 to '82 as a slow death of Sterlingwale?

A. I would say so, yes.

Q. And who did you report to at Sterlingwale?

A. Leonard Ansin.

Q. Would you agree with his testimony concerning three buildings—the green, the red and the yellow?

A. Yes.

Q. The departments at Sterlingwale, do you recall how many departments there were?

A. Yeah, I can count 'em out. Let me see. Approximately seven to eight.

Q. Do you have exactly the same departments at Fall River Dyeing & Finishing?

A. I would say I have two or three less.

Q. Two or three less?

A. Yes.

Q. Do you recall which departments you don't have?

A. Yeah. I do not have the inspection department. I do not have the retail department. And I have a different set up as far as the backsizing make up department goes.

Q. What about the sales department?

(p. 154) A. No sales department.

Q. Is lack of a sales department—

A. And sample department.

Q. You don't have a sample department?

A. No.

Q. Is lack of a sales department the result of the fact that Fall River Dyeing operates as a commission dye house, as opposed to—

A. That's correct.

Mr. Redbord: I would object. I think the questions are just a little overleading.

Judge Kolko: It's leading. We have an answer, however. And I will take the witness's answer.

But let's try not to lead.

Mr. Clarkin: I'm just trying to—

Judge Kolko: I understand.

By Mr. Clarkin:

Q. Were there any layoffs during the period 1979 to February, 1982 at Sterling?

A. Yes. It was an up and down, in and out situation. There were layoffs.

Q. Were there fewer or more employees employed by Sterling on February, 1982—as opposed to February, 1980?

A. I would have to say yes.

Q. Fewer or more?

(p. 155) A. Fewer.

Q. Fewer?

A. Yes.

Q. What is the address of Fall River Dyeing & Finishing?

A. 160 Stevens Street.

Q. 160 Stevens Street?

A. One six oh.

Q. What was the address of Sterlingwale Corporation?

A. 168 Stevens Street.

Q. And you—can you explain to us the differences in the addresses?

A. It's a whole complex. And there was—every corporation in the complex has 168 Stevens Street. And we did not want—we wanted to distinguish the 160.

Q. Is your office in the same place as—

A. No, it isn't.

Q. —Sterlingwale?

A. No.

Q. Where was the Sterlingwale office located?

A. It's in the red building—

Q. The Sterlingwale office?

A. In the yellow building. We closed that up.

Q. Where is the Fall River Dyeing & Finishing?

A. In the red building.

Q. The brick production facility?

(p. 156) A. Yes.

Q. How many supervisors were employed by—supervisors, I mean foremen—were employed by Sterlingwale at the time of its demise?

A. I would say we'd have to be up in the neighborhood of approximately 18.

Q. How many supervisors are employed by Fall River Dyeing & Finishing at the present time?

A. Twelve.

Q. Do you have plans for any additional foremen?

A. No.

Q. Of the 12 supervisors you have, are any of those supervisors people who were not formerly employed as supervisors by Sterling Corporation?

A. Yes.

Q. Which ones? Can you give me some names?

A. Surely. The record shift dye house supervisor, Keith Kenyon, Jr.; Joe — — ina, maintenance; Edwardo Ameral, finishing; and the second shift cutting, Manual Reco—were not former supervisors.

Q. Now, who is Mo Machado?

A. Mo Machado ran the inspection department for Sterlingwale.

Q. Is he currently employed by Fall River Dyeing—

A. Yes, he is.

Q. —running the inspection department?

(p. 157) A. No.

Q. What does he do now?

A. He is in quality control.

Q. How did you hire foremen at Fall River Dyeing & Finishing?

A. Through contact, telephone contact, and also an ad in the papers.

Q. What newspaper?

A. The Fall River Herald News.

Q. Do you recall when you placed that ad?

A. In September. I don't know the exact date.

Q. The latter part of September?

A. I would say the mid part.

Q. Were you personally acquainted with all the Fall River—all the Sterlingwale supervisors?

A. Yes.

Q. Did you yourself call any of these foremen—

A. Yes, I did.

Q. —for Fall River employment?

A. Yes.

Q. Did you call all of them, or did some respond to ads?

A. Some responded to the ad, yes.

Q. The ad that you placed in the Fall River Herald News, was that an ad for just supervisory personnel?

A. No, it was for textile workers and supervisory and (p. 158) office.

Q. Do you recall how long that advertisement ran?

A. I believe it was for three days.

Q. Have you advertised since then?

A. No.

Q. No?

A. Just a couple of specific supervisor--I think it was clerical help that we advertised for—

Q. What was—

A. In the office.

Q. What was the volume of response, if any, to that advertisement?

A. Oh, we were just over—inundated. We were swamped with applications.

Q. Do you have any opinion as to the number of applications that were filled out?

A. It seemed like thousands. It was just overwhelming, how many people come in for a job.

Q. Now, getting back to the formation of Fall River Dyeing & Finishing, who owns the stock in Fall River Dyeing—

A. Arthur Freedman.

Q. Do you own any stock?

A. No.

Q. Who are the officers of Fall River Dyeing & Finishing?

A. Arthur Freedman, myself.

(p. 159) Q. Are you acquainted with various purchase and sale documents that were executed generally in September of 1982, relative to machinery and—

A. Yes, I was.

Q. —real estate located on Stevens Street?

Who owns the red building and the yellow building located on Stevens Street?

A. Fall River Dyeing & Fin—168 Stevens Street Realty.

Q. Is that a corporation?

A. Yes, it is.

Q. Who owns the stock in 168 Stevens Street Realty?

A. Arthur Freedman.

Q. Do you have any stock in the—

A. No.

Q. Is Fall River Dyeing & Finishing currently occupying those premises, the yellow and the red building?

A. Just the red building, not the yellow.

Q. Are you occupying the red building under the terms of the written lease?

A. There's a lease, yes.

Q. Have you seen it?

A. No.

Q. Who owns the machinery and equipment that Fall River Dyeing & Finishing—

A. Fall River Dyeing & Finishing.

(p. 160) Q. And how did Fall River Dyeing & Finishing Corp. obtain that equipment and machinery?

A. Through a purchase from Massachusetts Capital.

Q. Massachusetts Capital—

A. Capital Resources.

Q. —Resources?

Do you recall when that purchase was made?

A. In September.

Q. September—I believe it was all official September 16. There was quite a rigamarole.

Q. And did you attend an auction sale run by Beacon Auctioneers?

A. Yes, I did.

Q. Do you recall when that was?

A. I don't recall the exact date. I believe it was in October.

Q. Where was that sale held?

A. In the green building.

Q That's the building you did not purchase?

A. Correct.

Q. And what was auctioned off at that sale?

A. Dye stuff, chemicals, tubes, cottons, fabric, various items.

Q. Was it, in fact, a public auction?

(p. 161) A. Yes, it was.

Q. Were there other bidders present?

A. Yes, many.

Q. Did you recognize any of them from the trade?

A. A few, yes.

Q. Did you, on behalf of Fall River Dyeing & Finishing, make any purchases at that auction?

A. Yes, we did.

Q. Do you recall the dollar amount?

A. We purchased approximately $13,000 worth of various items.

Q. Do you recall the total dollar amount that was spent at that sale?

A. If I recall the conversation went, there was over $30,000-odd derived from the sale.

Q. And do you know where the items that were auctioned came from?

A. Yes.

Q. Where did they come from?

A. Sterlingwale Corp.

Q. What generally did you purchase on behalf of Fall River Dyeing & Finishing?

A. The biggest item was the left over griege goods, the dyes and chemicals.

Q. Would you tell us what griege goods are?

(p. 162) A. Griege goods are the woven cotton pieces goods, whether they be flat goods—your twills, drills—and/or corduroy griege goods. Odds and ends.

Q. And for what purpose did you purchase these griege goods?

A. We felt it was a good idea to purchase those griege goods to use as experimental, to get our equipment running, rather than to damage a customer's goods. We figured we'd use those as trial and error.

Q. I assume from your answer you did not intend to be a converter?

A. We are not a converter and have no intention to be.

Q. What are you?

A. We're a commission dyer and finisher.

Q. Did you agree with the previous descriptions of the difference between the two?

A. Yes.

Q. The definitions of—

A. Yes, yes.

Q. And you're strictly a commission dye house?

A. That's correct.

Q. The—did you play any role in the formation of Fall River Dyeing & Finishing Corporation?

A. Yes.

Q. And what was your role?

(p. 163) A. Well, the—

Q. How did it come about?

A. It came about with conversation in New York City, with Arthur Freedman.

Q. Were you employed at that time?

A. Yes, I was.

Q. By Velcord—

A. Velcord Southern.

Q. When did the first conversation take place?

A. I would say it took place sometime in the latter part—in August. I don't know the exact time. There was a lot of conversation that went on, but strictly conversation.

Q. And it was as a result of those conversations that Fall River Dyeing & Finishing was formed?

A. Yes.

Q. What was your intention in Fall River Dyeing & Finishing Corporation?

Mr. Redbord: Your Honor, I would object to his intentions.

Mr. Clarkin: Well, the corporation's—

Redbord: As opposed to what the facts were, not intentions.

Judge Kolko: Well, it was rephrased as the corporate purpose.

The Witness: We started a commission dyeing and (p. 164) finishing corporation.

By Mr. Clarkin:

Q. That was the purpose for which the corporation was formed?

A. Yes.

Q. Why did you open this operation in Fall River?

A. Because of the workforce; there was good, competent and capable people.

Q. Were you aware of the fact that there might be machinery available, or real estate, suitable for your purposes?

A. We were approached that there was real estate and machinery available.

Q. Do you recall who approached you?

A. Not me, but Arthur Freedman was approached by a machinery dealer who had the liquidation of the equipment, and a lawyer that had the land and building.

Q. Did Fall River Dyeing & Finishing then buy equipment and machinery from someone?

A. Yes, they did.

Q. Was that Mass. Capital Resources—

A. The machinery from Mass. Capital Resources; the land and building from a Mrs. Ansin.

Q. Did Fall River Dyeing & Finishing, or anyone acting on behalf of Fall River Dyeing & Finishing, to your knowledge, ever purchase anything from either Sterlingwale or Leonard (p. 165) Ansin personally?

A. No.

Q. No?

A. No.

Q. Is there any connection, to your knowledge, between Leonard Ansin—any member of his family or former stockholder of Sterling—and Fall River Dyeing & Finishing?

A. None whatsoever.

Q. Do you currently do business with Mr. Ansin?

A. No.

Q. Were you familiar with the entire production operation at Sterling?

A. Yes. I was.

Q. And certainly you're cognizant of the production operation you instigated at Fall River Dyeing &—

A. Yes.

Q. Are those production operations precisely the same?

A. Not precisely, but we do the same—it's the same idea of the work. We're doing processing and dyeing.

Q. Are there any differences of methods of production at Fall River with methods of production used at Sterling?

A. The methods meaning the various operations?

Q. Yes.

A. We have altered operations. But essentially we do the same process.

(p. 166) Q. Were you familiar with the working conditions at Sterling?

A. Oh, yes.

Q. Are you familiar with the working conditions at Fall River Dyeing & Finishing?

A. Yes.

Q. There's been any change in those working conditions?

A. I feel we have very contented workers, and more energetic and enthusiastic workers employed and working.

Q. Could you be more specific? What about the shifts in Fall River Dyeing & Finishing? Are they the same shifts as you had at—

A. Basically yes. 7:00 to 3:00.

Q. Are they the same length, same duration?

A. We are working presently two 10 hour shifts, when we got to full complement in mid-April. We are now up to two 10 hour shifts.

Q. Do you recall when you actually hired your first person, first production employee?

A. I would say that Monday after the signings, so I would say it would be around approximately September 20.

Q. Do you recall when that person started to work?

A. That Monday.

Q. How many people did you hire the first day you opened up?

(p. 167) A. Oh, it must have been six or eight employees.

Q. Do you know how many employees, approximately, you have now?

A. About approximately 106, 109.

Q. At the time you opened Fall River Dyeing & Finishing up, on or about September 20, did you go right into production?

A. No. We had to relocated machinery from the green building to the red building, and make adjustments within the complex.

Q. How long did it take you to accomplish that?

A. Approximately four or five weeks, six weeks.

Q. So that four to six weeks after September 20, you began your first production at Fall River Dyeing—

A. We started gradually, yes.

Q. At the time you opened the door on September 20, had you formulated some sort of a plan for Fall River Dyeing & Finishing, that you—

A. We had a projection—

Q. —had in terms of building the business?

A. Building, yes.

Q. And did that plan have any sort of final objective, in terms of completing your hiring—

Mr. Redbord: Your Honor—sorry to interrupt, Counsel.

Your Honor, I object to the plan and the intentions as to what might have been in their minds at the time. It would (p. 168) be more appropriate just to stick to the facts.

Judge Kolko. Let's get results. I'll overrule—I'll grant the—

The Witness: You had to have plannings and forecasts of what you expected to do.

By Mr. Clarkin:

Q. What did you expect to do? What did you plan on doing?

A. We planned to have a full one shift operation of 55 to 60 employees. And after we reached that goal, and then we'd see how business would be, and then we'd had planned that by the end of March, April, we should be in a full two shift operation and up to our expected production. And we come in pretty close.

Q. When did you reach—

A. I would say toward the mid—end of April, we were about right at our goal now.

Q. Did you assume any liabilities of Sterling—

A. None, whatsoever.

Q. Have you—you have obtained insurance coverage, I assume, the types of insurance for your business?

A. Yes. for Fall River Dyeing, yes.

Q. From whom did you obtain this insurance?

A. Feitelberg Insurance Agency in Fall River. We kept it locally.

Q. Were you given any credit for workmens compensation (p. 169) experience that Sterling had got at the time they operated?

A. No.

Q. Do you have a particular bank that you use as your primary—

A. Yes, we do. A local bank.

Q. What bank is that?

A. The Bank of New England.

Mr. Clarkin: May we go off the record for just a moment?

Judge Kolko: Off the record.

(Discussion off the record.)

Judge Kolko: On the record.

By Mr. Clarkin:

Q. I'm going to ask you to take a look at GC-10. Could you identify that document?

A. Yes.

Q. What is that?

A. It's a customer listing of Sterlingwale accounts, and Fall River Dyeing & Finishing.

Q. Is the underlining on that document, under the names of various companies, indicate anything to you?

A. They were Sterlingwale accounts.

Q. These were Sterlingwale accounts?

A. Former, yeah.

Q. And you heard Mr. Ansin's testimony, did you not?

(p. 170) A. Yes, I did.

Q. He believed there were three or four other companies on that list that Sterlingwale had done business with. Did you hear that?

A. Yes, I did, but he wasn't right.

Q. And during the time that you were employed by Sterlingwale as vice president, were you acquainted with the companies they did business with?

A. Yes. That was my job, of trying to procure the—

Q. And are you positive that the only customers on that list there that you did business with while at Sterlingwale were those underlined?

A. Yes.

Q. And all of the customers that you underlined there, were those customers all customers that Sterlingwale did commisison dyeing for?

A. That's correct.

Q. And this document represents the total amount of business you did with all customers between October 1 and the end of March—

A. That's right.

Q. Did you at any time purchase or make any kind of arrangement, verbal or in writing, to obtain the use of the trade name Sterling?

A. No.

(p. 170) (sic) Q. After 27 years in the business, do you have an opinion as to the relative value of that name in the trade?

A. It had a very good name in the corduroy quality throughout the country.

Q. Can you identify Respondent No. 1?

A. Yes, I can.

Q. When did you first see this?

A. I saw those Sunday evening when I came back from my road trip, and they were—it was in an envelope, a sealed envelope on my desk with my name on it.

Q. Where were you on your road trip?

A. In Lumberton, North Carolina.

How long had you been down there?

A. One week, Sunday to this Sunday.

Q. I would ask you if you can identify Respondent No. 2?

A. That was in the same envelope.

Q. Directing your attention to the period approximately two weeks ago, did you have occasion to have a conversation with Norman Rego and other—

A. Yes, I did. They came to my office.

Q. Do you recall the date that that occurred?

A. It would be two weeks ago. I think it was on a Friday. So that would be two weeks prior to Friday's date.

Q. And did you have conversation with Mr. Rego?

A. Very short conversation with Mr. Rego and two others—(p. 171) Frank Albernaz and Carlos Gabral.

Q. What did he say to you?

Mr. Redbord: I'm sorry, Your Honor, but I'm going to object at this point—both on the hearsay and relevance grounds. I think primarily the relevancy grounds, to the extent that what is going on, as I understood what might possibly be going on from a statement of Counsel earlier, this witness is going to talk about what the employees said to him regarding the union; that that would not be relevant. I'd rather bring it up at this time, than have to have it on the record and make a motion to strike.

Judge Kolko: I'm of the same mind, Mr. Clarkin.

Mr. Clarkin: May I make an offer of proof?

Judge Kolko: Go ahead.

Mr. Clarkin: That if Mr. Ansin [sic] were allowed to answer the question—

Mr. Redbord: It's not Ansin.

Mr. Clarkin: Not Mr. Ansin. I'm sorry.

If Mr. Chace were allowed to answer the question, he would indicate the date he's already testified to, the three individuals whom he's identified, came into his office, demanding to know what was going on with the UTW; indicated that they had just taken a poll of people throughout

the red brick building, all three floors, and that the guys "did not want this union to represent them".

(p. 172) By Mr. Clarkin:

Q. At the time Sterling closed in February of '82, did you on any occasion have contact with former production employees of Sterling, in the period of February '82 and September of '82?

A. I rarely did, because I had left the area and worked in New York City.

Q. And at the time you opened your business in September of '82, did you have conversations with people that you had hired to work at Fall River Dyeing & Finishing?

A. Yes, I did, on various occasions.

Q. Did people indicate to you at that time how they felt about the UTW?

A. They—

Mr. Redbord: Objection, Your Honor.

Judge Kolko: Sustained.

By Mr. Clarkin:

Q. Did you have conversations with former employees relative to the UTW?

Mr. Redbord: Objection again, Your Honor.

Judge Kolko: Let's have the relevance of it, Mr. Clarkin.

Mr. Clarkin: Again, I'll make an offer of proof if you sustain the objection.

If allowed to testify, he would indicate to you that when he opened the doors at Fall River Dyeing & Finishing, he (p. 173) had conversations with a number of employees, former employees of Sterling Corporation, he hired to work at Fall River Dying & Finishing. And they indicated to him that they were extremely displeased with the UTW, with what they felt was lack of representation in liquidation of the business, and their failure to receive pay; that they wanted nothing to do with that union.

Judge Kolko: Okay, I will sustain the objection for the reason that I am not convinced at all that it's relevant to a determination as to the company's good faith feeling that the union did not command majority support among the employees, in terms of the actual representation issue.

As to ideology, feelings and beliefs, I think we get beyond what we can legitimately deal with in this proceeding.

By Mr. Clarkin:

Q. Beginning on September 20, 1982, up until the time you received Respondent 1 and 2, did you ever receive any kind of a writing of anyone, any employee in the employ of the United Textile Workers, indicating that they sought representation of your employees?

A. Yes, I did.

Q. What was that?

A. It was a letter from Mr. Lenehan.

Q. Is that the only document you ever received on behalf of your employees?

(p 174) A. Yes.

Q. Did you ever receive any kind of a document from your employees themselves?

A. No.

Q. None of your employees ever made a demand to sit down and negotiate a contract?

Mr. Redbord: Objection, Your Honor.

Judge Kolko: Overruled.

The Witness: About two weeks prior, when Norman Rego—that was their purpose of coming and finding out what was going on. And they wanted to formulate a type of committee so they could get direction of what was happening and where they could go. Because they did not want—their feelings to me was that they did not want the representation of the Textile Workers Union.

Thy wanted to come in and start the ball rolling. And I said there was nothing we could do about it.

Mr. Redbord: Your Honor, I move to strike the answer as non-responsive to the question. Was there a demand of employees?, was what I understand the question to be. Demand of employees for the union. And the answer we got was, they didn't want the union.

Judge Kolko: Yes, I didn't see the connection, either. I will strike the answer.

Ask the question again and let's see if we can link up (p. 175) an answer to the question.

Mr. Clarkin: I liked the answer.

Judge Kolko: That may be, but it goes to a different question.

By Mr. Clarkin:

Q. Did you at any time between the period September 20, 1982 to last Friday receive any kind of a demand from any of your employees to sit down and negotiate a contract?

A. No, nothing.

Q. I ask you to take a look, Mr. Chace, at GC-8. Can you identify that?

A. It's a list of employees, yes, of Fall River Dyeing & Finishing.

Q. What information does it disclose to you? Have you seen it before?

A. Yes. It's a list of the employees, when they were hired, and their job description.

Q. As of what date?

A. As of April 22, 1983.

Q. Was this an original document, before some alterations were prepared at your direction?

A. Yes.

Q. I direct your attention to the far left hand column of the document caption—former Sterlingwale.

A. Right.

(p. 176) Q. That column indicates either yes or no.

A. Uh-huh.

Q. What were those yes and nos based upon? How was that information derived?

A. From the applications.

Q. From applications?

A. Applications, and knowledge.

Q. Your own personal knowledge?

A. Yes.

Q. Are there any employees on here, to your knowledge, who were not, in fact, employed by Sterlingwale in 1982?

Mr. Redbord: Your Honor, I would object. We have the total records for '82. That would be the best evidence. If they're not there, they're not there.

Judge Kolko: I was just thinking that.

I see the after 4:00 syndrome starting to set in.

Mr. Clarkin: I'm sorry.

Judge Kolko: It affects us all, I assure you. Particularly since they turned the air off in this room.

Mr. Clarkin: May I have just one more moment?

Judge Kolko: Off the record.

(A short recess was taken.)

Judge Kolko: On the record.

Mr. Clarkin: I have no further questions, judge.

Judge Kolko: Cross examine?

(p. 177) Mr. Redbord: Thank you, Your Honor.

CROSS EXAMINATION

By Mr. Redbord:

Q. Mr. Chace, one preliminary thing. I just want to be sure I understood you properly.

Is it not the case that, at some point, you did receive a demand for recognition from the union in this case? Is that not correct?

A. Yes, I did.

Q. Okay. As I understand your direct testimony, when you first came to Sterlingwale, it was commission dyeing?

A. That's correct.

Q. Then at some point over the last 10 or 15 years of the operation, you began to do more converting?

A. [No verbal response.]

Q. Is it not also the case that the last couple of years, you started to go back to doing some commission work?

A. We attempted, the last two years, to try to get back into the commission work.

Q. And some commission work was, in fact, being done?

A. Yes, it was.

Q. Now, at Fall River Dyeing, I understand you no longer have an inspection department as such?

A. Correct.

Q. Now, am I correct that that was combined on a (p. 178) departmental basis, that was combined with tubing?

A. Yes. It was put to one operation—inspecting and tubing.

Q. So the goods are still being inspected?

A. Oh, definitely.

Q. There is no—and the other departments which you don't have are retail?

A. Correct.

Q. And sales department?

A. And sample.

Q. What was the sample department at Sterling?

A. Please?

Q. What did the sample department at Sterlingwale do?

A. Well, because of being a converter, you had to send out 10 yard cuts to this designer, and half yard cuts, and it was a tremendous operation of sampling before you could get an order. You had to sample, and that's what they did.

They would send out 10 yard cuts of maybe six or eight different colors. And this was—you had to do this; you had to sample before you could get a bulk order.

Q. Would it be fair to say that Sterlingwale did no—no sampling activity on its commission work?

A. No.

Q. Am I correct when I say that?

A. That's correct.

(p. 179) Q. Now, you indicated that Fall River's address is 160 Stevens?

A. Please?

Q. Fall River's address is—

A. 160 Stevens.

Q. And Sterlingwale's was 168?

A. Right.

Q. But the building, the red building, is the same red building—

A. Yes, it is. It hasn't moved.

Q. And the yellow building that we're talking about has also not moved?

A. It's there; it's vacant.

Q. Now, you indicated that you have some supervisors who were not supervisors at Sterlingwale?

A. Yes.

Q. I believe you mentioned Mr. Kenyen. It that correct?

A. Keith Kenyen, Jr.

Q. Now, Mr. Sousa, you mentioned also?

A. Yes.

Q. But is it not true that Mr. Sousa was a production employee at—

A. Yes, he was.

Q. And Mr. Manuel Rego was also a production

employee—

A. Yes, he was.

(p. 180) Q. What about Mr. Ameral? Was he not a prod—

A. He was production worker.

Q. Was Mr. Kenyon a production worker?

A. He was not employed by Sterlingwale.

Q. Is there another Mr. Kenyon?

A. Yes, there was. There was his father.

Q. Was his father ever employed by Sterlingwale or by Fall River—

A. He is employed by Fall River Dyeing.

Q. The father?

A. The father and son are both employed by Fall River Dyeing.

Q. I'm sorry. I thought you said one of them passed away.

A. No.

Q. Oh, okay! Now, Mr. Machado is doing quality control?

A. Yes.

Q. Was Mr. Machado employed at Sterlingwale?

A. Yes, he was.

Q. And what was his job at Sterlingwale?

A. He headed up the inspection department.

Q. Is it fair to say that, in some sense, inspection is part of quality control?

A. In some sense, yes. But there's a lot more involved in doing full quality control—

(p. 181) Q. Inspection would be a piece of quality control?

A. Yes, it is. But he does not run the inspection and tubing department. He is strictly troubleshooting, quality control, my right arm assistant.

Q. And who does run the inspection department?

A. Frank Cobral, inspection and tubing department.

Q. That combined department, the inspection and tubing, is it not the case that both the tasks—the inspection and the tubing—were done at Sterlingwale, and that now they've been combined into one department?

A. Correct.

Q. Are you familiar with something called Marcamy Sales?

A. Yes, I am.

Q. Is it the case that Mr. Freedman wholely owns that company?

A. Yes, he does.

Q. Now, you mentioned that one of the reasons that you thought about—I shouldn't say you. Perhaps you and Mr. Freedman, but I guess at least you thought of returning to Fall River and that this operation was a good idea because there were good people available in Fall River?

A. Yes.

Q. When you were thinking that, were you thinking of some of the Sterlingwale people who had been laid off from Sterlingwale as part of the good people available?

(p. 182) A. Yes.

Q. When you—you indicated you got just swamped with applications?

A. Yes, we did.

Q. When you went through those applications, I imagine you took into account what previous experience people had had? Is that—

A. Yes, yes.

Q. And in that regard, if an employee had experience at Sterlingwale, that was something that you took into account, would that not be true?

A. Sterlingwale and other finishing plants also.

Q. When you needed certain—when you needed employees, you went through those applications, right?

A. I did, and my department supervisors went through them.

Q. And you went through to see who had what skills, to fit the company's needs. Right?

A. The workers. Each department supervisor basically knew the workers, or knew the operation. And on their recommendation, we did the employing. I did the employing on their recommendation.

Q. Let me see if I got you. The foremen reviewed the job applications?

A. Yes, they did.

Q. And you also did an independent review?

(p. 183) A. I did it along with them.

Q. Now, if an employee—when you're going over these applications—I shouldn't say employee—if an applicant had done a certain job at Sterlingwale, is it not the case that many times you hired him for that exact same job at Fall River Dyeing?

A. I would say there were some cases we did and some cases we didn't.

Q. Some cases where you didn't hire them at all?

A. That's correct.

Q. Now, you've had some experience in commission dyeing. Correct?

A. [No verbal response.]

Q. And some of that experience came from the time you were at Sterlingwale, right?

A. Yes.

Q. From where else did that experience in commission dyeing come?

A. Velcord Southern.

Q. That was mostly commission dyeing, or all commission dyeing?

A. It was similar to Sterlingwale. It was commission dyeing and converting.

Q. So your—so when you started the operation in September, your experience in commission dyeing was

based on (p. 184) employment with both of those employers—Sterlingwale and Velcord?

A. My background.

Q. Do you recall, sir, when it was that you put on a second shift?

A. It would be the—in the latter part of January. As I say, we just kept building this up gradually—

Q. The latter part of January?

A. I would say. And it was just a partial. We would go with two or three men, and then keep building every month. We've been building since we started.

Q. Now, prior to putting on that second shift, would it be fair to say that the first shift was pretty much at its full operating level?

A. I would say in January we were, yeah.

Q. And there were employees in all the various classifications of the company by that time?

A. Pretty must so. It was kind of staggered, depending on what type of fabric we were running. As far as cutting, we weren't very strong in the cutting area. It was more in the flat goods area.

Q. Isn't it the case, sir, that in November, that there were pretty much employees all across the range of categories of employees that you employ?

A. I had several in the various departments, yes.

(p. 185) Q. In November, you certainly were handling customer orders, correct?

A. Yes.

Q. And production was in motion?

A. The latter part of November, yeah.

Q. When you mentioned the very beginning, when you first got going, it took sort of a couple weeks to get things in motion. What was—I believe you mentioned that. Is that correct?

A. Yeah. More than a couple of weeks.

Q. What was going on the first week or two?

A. We had to go through—we weren't sure how the equipment would be, what condition it was in. I hadn't been in the plant since February. And we had—logistics, we had to move heavy equipment from the green building, put it into the red building, and had to do all that transaction, the transferring of equipment.

And we had, you know, various problems in starting up the machinery, from being idle. It was just shut down. We have computers and we had to get these all programmed. It was quite a long task.

Q. As I understand your testimony, that—if you will—start up period took about four to six weeks from its commencement in late September?

A. That's right.

(p. 186) Q. And after that time, production started to get going?

A. Right. It was experimental production for another four, five weeks. We went in gradual. We just didn't want to ruin a lot of fabric and turn customers off, so to speak.

Q. By the end of another four, five weeks, production was fairly much in motion?

A. It was in motion.

Q. And would you say it was substantially in motion by that time?

A. It was leading to that, yeah. It started gradual, and then kept building up, every month.

Q. And it kept building and building until January, and you put on another shift?

A. We started another shift. See, being the type of operation we are where you have wet goods, you have to—once you start doing enough production—you have to go into a second shift operation. Maybe you wouldn't have a first shift operation, but you'd have to go into a second to finish off the fabric, in finishing.

Q. Now, as of, say, the—do you happen to recall as of Christmas of 1982, what the volume dollar of business that had been done at Fall River Corporation was?

A. Gee, I really don't know.

Q. Do you have any reasonable estimate, from your recollection?

(p. 187) A. No. I was just so wrapped up in getting everything going and the various operations, that Art Freedman took care of the financial, all the financial—you know, helping out on financing the operation.

Q. But there certainly were—

A. There was units being billed, yes.

Q. Units being billed means what? I'm not familiar with the—

A. Billing transactions.

Q. Oh, billed.

A. Billed, yes.

Mr. Redbord: Would you mark this?

(The document above-referred to was marked General Counsel's Exhibit No. 19 for identification.)

By Mr. Redbord:

Q. I'd like to show you, sir, what's been marked G.C. 19, which is a computer sheet with various things, invoices attached to it. I think they're invoices.

Would you identify that for me, please?

A. Yes, this is a factor sheet.

Q. What is a factor sheet?

A. It's where you work with a bank and they guar—if you call in for an order of credit approval on a customer you're doing business with, they guarantee the receivables once they (p. 188) approve. And then you do factor, and you pay for the service. But it's a guarantee that you will receive for moneys.

Q. What does disbursements mean?

A. Disbursements will mean that money is transacted to us, collections.

Q. Does that mean that the customers are paying these amounts?

A. Yes.

Q. And the one that I've shown you, GC-19, is for the month of—

A. November.

Q. So during November, these would be the disbursements?

A. Correct, yes.

Q. Now, I just want to make sure, 'cause it's late, and I want to be sure that I'm not screwing up, a disbursement indicates a dollar amount that a—a customer order?

A. Of the finishing charged to the customer, yes.

Q. What do you mean, of the finishing charged?

A. This is what it—he was billed to finish the fabrics.

Q. Now, at the bottom here, there are some things indicated in pen—pencil. Do you know what those are?

A. It's listing down what the factoring charges were, our postage—our controller put this on—our bank charges, our professional fees and our interest expense was for the month.

(p. 189) Q. Are those internal—

A. Yes.

Q. —cost matters?

A. Yes.

Q. One other thing on this—what is this subtotal column?

A. I'm not sure. Sales, let's say. Balance forward sales, 145,000.

Q. What does that mean, balance forward—

A. There's a subtotal—

Q. $145,001.38—what does that mean? Do you know?

A. Not really. I would assume that is a carry forward of the subtotal.

Q. A subtotal of sales? You mean accounts receivable?

A. I believe so, yes.

Q. For previous months?

A. I would say.

Q. And this factor sheet is kept in the ordinary course of business by the company?

A. Yes.

Q. As a matter of fact, it's the main way in which the company keeps—

A. That's how we keep track of order sales.

Mr. Redbord: I would offer GC-19.

Judge Kolko: Any objection?

Mr. Clarkin: I note, in reviewing GC-19, what we're (p. 190) dealing with here is a computer print out. And in addition to the typed in computer numbers and words, there are some markings down here in pencil.

Mr. Redbord: Right. I believe I asked him to identify those, and he said those were internal costs and these figures were entered by the controller.

The Witness: Yes.

Mr. Clarkin: I have no objection.

Judge Kolko: Received.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 19 for identification, was received in evidence.)

Judge Kolko: It may be withdrawn for copying, if Counsel needs—

Mr. Redbord: I'm afraid, Your Honor, there'll be a number of documents that fall into that category.

Judge Kolko: Well, you've got a general authorization.

Mr. Redbord: Thank you.

By Mr. Redbord:

Q. Mr. Chace, is it not true that Mr. Freedman has very little to do with the day to day running of Fall River?

A. No, he's very much involved in what's happening, and on the financial end of the company.

Q. On the financial end?

(p. 191) A. Yeah.

Q. What about, if you will, the production end, dealing with the labor relations aspect? Does he really have anything to do—

A. No. But he is concerned and—

Q. I appreciate his concern. But on a day to day basis—

A. On a day to day running of the plant, it's my responsibility.

Q. Now, at Sterlingwale, what did your responsibilities entail?

A. I had many over the years.

Q. Well, say, in the last two or three years.

A. The last two to three years, I was basically involved in sales, selling of all goods and regular goods—whatever promotion I could get—and also trying to generate some commission customers.

Judge Kolko: And who, in those last two years, did the type of work that you do now—

The Witness: Alfred Canuel, was the plant manager.

Judge Kolko: And that was his title?

The Witness: He was the plant manager, superintendent.

By Mr. Redbord:

Q. What happened to him?

A. He was let go the end of '81, in December, prior to—just before the close down.

(p. 192) Q. That was in—

A. December, '81.

Mr. Redbord: I have nothing further, Your Honor.

Judge Kolko: Any redirect?

Mr. Clarkin: No further questions.

Judge Kolko: The witness is excused. Thank you, sir.

(The witness was excused.)

Mr. Redbord: Your Honor, before—I'm being presumptuous.

Judge Kolko:Yes, let's hear from Mr. Clarkin.

Mr. Clarkin: That's the Respondent's case, Your Honor.

Judge Kolko: Very well, anything further from General Counsel?

Mr. Redbord: Yes, Your Honor.

You recall, at the very beginning of the hearing, a stipulation regarding a certain bill of sale on assignment, which we were waiting for by Federal Express but which has never come.

I'm prepared to offer a stipulation that there was, in fact, or there is in fact a document dated September 17 entitled, The Bill of Sale and Assignment. In that document, Massachusetts Capital Resource Company, secured party under a security agreement with Sterlingwale Corporation, dated May 31, '78, in consideration of $525,000 paid by Fall River Dyeing & Finishing Corp. does hereby grant, sell, transfer (p. 193) and quit claim to the said Fall River all of its right, title and interest as secured party in and to all machinery and equipment, furniture and fixtures located on the premises now—now being the date of the document

—or formerly occupied by Sterlingwale Corporation, located at 168 Stevens Street, Fall River, Mass. including, without limitation, all of its right, title and interest in and to the items described in an inventory—which is Schedule A to an agreement dated August 30, 1982—by and between Mass. Capital Resource Corporation, Marcamy Sales Corporation and Lila Ansin.

Mr. Clarkin: I cannot stipulate to all of that, because I have not seen the original signed document.

I will agree to stipulate that on September 17, 1982, Fall River Dyeing & Finishing Corp. purchased equipment, machinery from Mass. Capital Resources, and that Mass. Capital Resources had taken possession, in terms of a chattel mortgage, of the equipment and machinery from the purported predecessor, Sterlingwale.

Mr. Redbord: Can we include in that stipulation the items that were purchased were those items included in the August 30, 1982 document between Lila Ansin, Marcamy Sales and Mass. Capital Resource?

Judge Kolko: Or if you want me to hold the record open for receipt of that document, which can later accompany it, we can do whichever.

(p. 184) Mr. Clarkin: Yes, would you do that?

Judge Kolko: Yes, for the receipt of one document which will say whatever the document will say better than can be paraphrased — I have no problem holding the record open. You'll deal with the Reporter on that.

Mr. Redbord: Well, I have no problem holding the record open, Your Honor, assuming that— that— the document was subpoenaed and I would ordinarily like to—

Judge Kolko: So much for Federal Express being there by 10:30!

Mr. Clarkin: Well, Your Honor, I requested this document early next (sic) week for the home office in New York. They sent me, obviously, most of it. For some reason, this was not included.

I called down there Friday and they assured me it was being sent up Friday afternoon Federal Express. I have no explanation.

Judge Kolko: Okay, obviously, as I say, it is not something that requires a witness and cross examination. So we're not terribly burdened.

Mr. Redbord: Well, in case the document, for some reason, should never arrive or disappear or something, we might as well at least be willing to stipulate to at least as much as counsel would be willing to stipulate at this point.

(p. 195) Judge Kolko: Let's hear out of Mr. Clarkin's mouth—

Mr. Clarkin: Counsel will stipulate that on September 17, 1982, Fall River Dyeing & Finishing Corporation purchased various machinery and equipment from Mass. Capital Resources partnership; that Mass. Capital Resources had taken possession of this machinery and equipment; and in terms of the chattel mortgage, foreclosed against Sterlingwale Corporation; and that the consideration for that purchase was $525,000.

Mr. Redbord: Well, I'll stipulate to that, Your Honor, with the proviso that we'll keep the record open for the receipt—

Judge Kolko: The record will be held open, commensurate with the length of time for briefs, which is the 6th of June, 1983, and during which time presumably that document will make its appearance — at least in time for you to make reference to it in your brief.

If it does not, I assume I will hear about through some formal means and we'll deal with that as the situation arises.

So solely for the purpose of that one document, the record is being held open. For all other purposes, I'm closing the record.

Mr. Clarkin: Did I understand Your Honor to say briefs are due June 6?

(p. 196) Judge Kolko: That was my— I don't have my calendar handy. But I ticked off mentally five weeks from today. If I am in error—which is what the Board's rules call for. I can't give you more time myself, but the rules call for a means of dealing with that as well.

Should anybody ask me down the road if a reasonable extension of time should be granted, at this point I would say no reason to say no.

So it would be June 6 as the date the briefs will be due under the Board's rule.

Mr. Redbord: As a formality, should we leave the record open for the providing of copies to the Employer?

Judge Kolko: All right. For those two purposes, the record will be open.

Anything else?

(No response.)

Judge Kolko: All right, gentlemen, thank you very much. We are adjourned, and my thanks to our Reporter.

(Whereupon, at 5:00 p.m., the hearing in the above-entitled matter was closed.)

(p. 197) CERTIFICATE

This is to certify that the attached proceedings before the NATIONAL LABOR RELATIONS BOARD, BOSTON REGION REGION;

In the Matter of:

FALL RIVER DYEING & FINISHING CORP.

Date: May 2, 1983

Place: Boston, MA

where had as therein appears, and that this is the original transcript thereof for the files of the Board.

/s/ (Illegible)
Official Reporter

G.C. EX #2

Agreement made this 30th day of August, 1982, by and between Marcamy Sales Corp., a New York corporation, Lila M. Ansin ("Mrs. Ansin") who resides in Hollywood, Florida and Massachusetts Capital Resource Co. ("MCRC"), a Massachusetts partnership with its office at 545 Boylston Street, Boston, Mass.

WHEREAS, Mrs. Ansin as the holder of a mortgage on the land and buildings located at 168 Stevens Street in Fall River, Massachusetts, now or formerly occupied by Sterlingwale Corporation and sometimes known as the "Red Building" (the "Premises") has, by reason of a default or defaults under said mortgage, noticed a mortgagee's sale of the Premises to take place on August 30, 1982.

WHEREAS, MCRC holds a security interest in certain machinery and equipment located in the Premises, which is substantially described in the inventory which is Schedule A hereto (the "MCRC Equipment") and is in possession thereof by reason of defaults by Sterlingwale Corporation in the obligations secured thereby;

WHEREAS, Marcamy is desirous of purchasing the Premises as well as the machinery and equipment located in the Premises.

NOW, THEREFORE, the parties severally agree as follows:

1. In consideration of twenty-five thousand dollars ($25,000) this day paid by Marcamy to MCRC, MCRC gives and grants to Marcamy or its nominee or assignee an

option, exercisable as set forth in this paragraph 1, to purchase the MCRC Equipment, upon the terms and conditions set forth in this paragraph 1.

(a) The said option may be exercised by Marcamy or its nominee or assignee giving written notice to MCRC less than seven nor more than fourteen days after the date of such notice, at which time a bill of sale by MCRC delivering title to the MCRC Equipment on an "as is, where it" basis (less the items listed on Schedule B hereto) and a release of all claims of ownership by MCRC in any contents of the Premises not described on Schedule B shall be delivered to Marcamy or its nominee or assignee against payment of the balance of the purchase price of five hundred twenty-five thousand dollars ($525,000), after crediting all payments made by Marcamy to MCRC under this agreement, by certified or bank check or checks, the said Closing to take place at the office of Ropes & Gray, 225 Franklin Street, Boston, Mass. at the date and time set therefor.

(b) If Marcamy fails to exercise this option during the option period or after such exercise fails to complete the transaction within the period provided above, then MCRC shall retain all sums of money paid to it pursuant to this agreement.

(c) Pending completion of the sale of the MCRC Equipment to Marcamy, MCRC agrees to maintain security on the Premises, including the said MCRC Equipment, and warrants that all items set forth on Schedule A

will be included in the MCRC Equipment to be sold hereunder, except as excluded under Schedule B.

2. Mrs. Ansin hereby agrees that she or her authorized representative will appear at the foreclosure sale presently scheduled for August 30, 1982 (or any adjourned date of such sale scheduled for not later than September 7, 1982) and that she will bid up to the amount due to her under her mortgage to purchase the Premises.

3. In the event that Mrs. Ansin purchases the Premises at the said foreclosure sale, she hereby agrees to sell and convey the said Premises to Marcamy or its nominee or assignee, by good and sufficient quitclaim deed in form and substance conveying a good and clear record and marketable title to the Premises free from encumbrances except (i) provisions of existing building and zoning law, (ii) such taxes for the then current year as are not due and payable on the Closing Date, which shall be appor- Benjamin Manchester to unlocated heirs, which will was probated in 1898. The said deed shall be delivered at a closing to be held at the offices of Hanify, King & Glovsky, Suite 400, 79 Milk Street, Boston, Mass. not later than September 13, 1982. The purchase price for the conveyance of the Premises from Mrs. Ansin shall be three hundrew twenty-five thousand dollars ($325,000), which sum shall be paid at the said closing by certified or bank check or checks. To enable Mrs. Ansin to make conveyance as herein provided, she may on the Closing Date use the purchase money or

any portion thereof to clear the title to the premises of any or all encumbrances or interests, provided that all instruments so procured are recorded simultaneously with the delivery of the deed, or that provision for prompt recording thereof is made on the Closing Date. After the Closing, at no cost to MCRC or Marcamy, Mrs. Ansin agrees to promptly make her best efforts to register Parcel 4 or take such other action or any part thereof necessary to remove the defect referred to above.

4. In the event that Mrs. Ansin is not the highest bidder at the foreclosure sale or fails or refuses to deliver title to the Premises in accordance with the provisions of paragraph 3, Mrs. Ansin hereby agrees to pay to Marcamy, within ninety (90) days after the foreclosure sale, the sum of $25,000 in compensation of the amounts paid by Marcamy to MCRC hereunder. Upon such payment, Mrs. Ansin shall be released from any and all claims of Marcamy and/or MCRC arising out of this agreement.

5. The parties agree to proceed in good faith. Marcamy, MCRC and Mrs. Ansin agree to refrain from taking any action which would in any way encourage delay of the foreclosure sale scheduled for August 30, 1982. Should Marcamy or MCRC take any action which encourages delay of such scale and such sale is in fact delayed, then this agreement shall be null and void as to Mrs. Ansin.

6. This instrument, executed in triplicate, is to be construed a Massachusetts contract, is to take effect as a sealed instrument, sets forth the entire contract between the parties, is binding upon and inures to the benefit of

the parties hereto and their respective heirs, devisees, executors, administrators, successors and assigns, and may be cancelled, modified or amended only by a written instrument executed by all of the parties hereto.

7. All notices, payments and other communications hereunder shall be in writing and shall be deemed duly given when mailed, by registered or certified mail, first class postage and registration or certification charges prepaid, addressed, or when delivered, to MCRC,

c/o William F. McCarthy
Ropes & Gray
225 Franklin Street
Boston, MA 02110

to Marcamy:

c/o Theodore Sternklar
Gottlieb Schiff Ticktin,
Sternklar & Harris, P.C.
555 Fifth Avenue
New York, New York 10017

to Mrs. Ansin:

c/o Richard D. Glovsky, Esq.
Hanify, King & Glovsky
Suite 400
79 Milk Street
Boston, MA 02109

IN WITNESS WHEREOF, the parties set their hands and seals below.

MASSACHUSETTS CAPITAL
RESOURCE COMPANY

By William J. Carpey
(Duly Authorized)

MARCAMY SALES CORPORATION
By Arthur M. Friedman, Pres.

(Duly Authorized)

/s/ Lila M. Ansin

SCHEDULE A

UNITED TEXTILE MACHINERY CORP.

STERLINGWALE INVENTORY

SUMMARY BY LOCATION

Page	Area
1 - 6	Dye House Area
7	Dyer's Office
7	Drug Room
8, 9	Dye House Area
10	Hallway
10 - 12	Frame Room
12, 13	Inspection Room 1st Floor
13a	Inspection/Retail Room 1st floor
13a - 16	Inspection Put-up
16 - 18	Packing & Shipping Office 1st floor
18	Sample Room 2nd flor
19	Engineers' Office 2nd floor
20 - 22	Laboratory 2nd floor
22	Laboratory Conference Room 2nd floor
22	Second Floor (Heat recovery)
23	Tin Shop 2nd floor
23 - 26	Cutting & Inspection 3rd floor
26	Cutting Roor Rear Shop 3rd floor
26	Cutting Room Office
27	Air Compressor Room 1st floor
27, 28	Machine Shop
28 - 30	Green Building
30	Rear Yard Continuous Range Tanks
31	Main Office - Reception Area
31	" — Hallway Closet
31, 32	" — Sales Room
33	" — President's Office
33	" — Chase's Office

Lot #	Quantity	Item
17	1	Poensgen 71" Dye Jigg, 1973 s/n 906
18	1	Poensgen 71" Dye Jigg, 1973 s/n 907
19	1	Poensgen 71" Dye Jigg, 1973, s/n 904
20	1	Poensgen 71" Dye Jigg, 1973, s/n 884
21 - 21F		As Listed:
21	1	Asia Dye Jigg, 2/79, s/n 1821, 71"
21a	1	Menzel A-frame Batcher, Type 72SB 6/81, s/n 01118
21b	1	Portable Hydraulic Batcher Pump, Asisa
21c	1	Portable Hydraulic Batcher Pump, Asisa
21d	1	Jack Handle
21e	1	Portable A-frame
21f	1	Portable A-frame
22	1	Yale 1-ton electric hoist
23	1	60" two-roll padder with Polychromatic Dye Head and air guiders; unit has 7½ hp 550V drive
24	1	C & M one-ton electric hoist
25	1	C & M one-ton electric hoist
25a	1	Water cooler
25b	1	Emergency Eyewash and Shower
25c	1	Hot water tank, approximately 10 gal.
25d	1	Hot water tank. approximately 30 gal.
25e	1	Two-section s/s sink
26	1	Two-position Rolled with motor
27	1	Budgit 1-ton electric chain hoist
28	1	Budgit 1-ton electric chain hoist
29	1	5 hp Homogenizing Mixer, 230/460V
29a	1	S/S Tank, 36" Wide X 36" Deep
30	1	Lightning Mixer
30a	1	S/S Tank, 36" Wide X 36" Deep
31	1	60" two-roll Dye Padder with 5 hp Veri-drive and pump, with air guiders
31a	1	Budgit ½-ton electric chain hoist
32	1	Menzel 72" A-frame Batcher, Type 72SB, s/n 03278, 6/78

Lot #	Quantity	Item
33	1	Kusters Padder with air guiders, motor and reducer, 79'' wide, s/n 10373028, 1978
34	1	5hp Homogenizing Mixer
34a	1	S/S Tank, 36'' Wide X 36'' deep
35	1	Lightning Mixer
35a	1	S/S Tank, 36'' wide X 36'' deep
36	1	Two-station Rewind Stand
37	1	One-ton Load Lifter cable hoist
38	1	One-ton Shaw cable hoist
39	1	Menzel 80'' A-frame Batcher Type 80SB, s/n 02524, 6/81
40	1	71'' Rubber/Stainless two-roll Nip with Bow Roll. Nip enters into one compartment rinse tank with 4 rolls bottom and 5 rolls top. Wash tank has air guiders.
41	1	½-ton Budgit electric chain hoist
42a	1	Portable Menzel motorized A-frame 75'' face X 16'' diameter, ½hp motor 115/208/230V
42b	1	"
42c	1	"
42d	1	"
42e	1	"
42f	1	"
42g	1	"
42h	1	Menzel Square bar stand for 72'' square bars, 1¼''
42i	1	Menzel A-frame with 72'' s/s dye beams with 38'' perforations
42j	1	"
42k	1	Menzel A-frame jack handles
42l	1	"
43	46	Dry Cans 144'' X 23'', Morrison, 94PSI 334° F, 1977, with Nash pump and 20hp motor, unit has swing fold exit with cooling can, entry has double brushing and beaming system

Lot #	Quantity	Item
44	1	S/S Tank with Lightning Model 80R Mixer and Pump
45	1	Yale 1-ton electric cable hoist
46	1	Mt. Hope motorized 60'' portable Scray, s/n 60-CRF 346
47	1	Budgit 1-ton electric chain hoist
		(Continuous Range (Lot #48 - #62a))
48	1	Werner Scray, 70'' wide with motor and air guiders
48a	1	S/S 500-gallon tank
48b	1	Lightning Mixer
48c	1	Rodney Hunt s/s Steamer Location SECOND FLOOR OVER RANGE), s/n 3572-W, 72'' wide, 27 rolls top and 27 rolls bottom; 8 Washington hydraulic motors mounted on top rollers; main drive is a Continental hydraulic pump, Model PVR50-42ASR-RF-O-5-G, 1,200 rpm capacity at 1,000 psi; 42gpm driven by Baldor 30hp 230/460V motor
49	1	S/S two-section saturator or wash box; first section has bow roll on entry, two s/s rolls in bottom, and two s/s rolls with one bow roll top; second section has two s/s rolls bottom and two s/s rolls top, entering into a Morrison two-roll rubber and s/s Nip; s/n T-213, 1977
50	1	72'' Brush converted to or used as rinse
51	1	Morrison 72'' enclosed washer with six rolls top and seven rolls bottom with Morrison 5-ton 72'' rubber with s/s Nip, wash box has 7½hp drive, 1,750 rpm

Lot #	Quantity	Item
52	1	72'' Brush and washer combination, unit has two top brush rolls, 7½hp motor
53	1	Greenville Steel enclosed wash box, six rolls top, 4 rolls bottom, with rubber and s/s 72'' Greenville Steel Nip, approximately 5-ton motor, 5hp, 1,750 D.C.
54	1	"
55	1	"
56	1	Corduroy cross brushing machine, 64'' wide
57	1	"
58	1	72'' Brushing and washing combination
59	1	Greenville Steel 72'' Rubber/ s/s Nip
60	1	Forty-eight (48) 70'' Dry cans by Synalloy Corporation; first 8 cans teflon coated, next 40 cans arranged in stacks of 10; 125PSI at 353°F, 1970
61	1	72'' Wash box with 3 rolls top and 3 rolls bottom, air guiders on entry, 7½ hp D.C. motor, 72'' rubber/s/s Nip
61a	1	Lightning Mixer
61b	1	S/S Tank, 62'' wide X 48'' deep, with pump and small 10-gallon pressure tank
61c	1	½-ton Budgit chain hoist, manual
62	1	Four-roll Silk City 90'' Batcher with full control console
62a	1	Yale 1-ton electric cable hoist (located over Lot #62)
		End Continuous Range
63	1	Simplex electric time clock
64	1	½-ton Load Lifter electric cable hoist
65	4	Fifty-gallon tank @ $10 each
66	1	S/S Tank 50'' deep X 36'' diameter

Lot #	Quantity	Item
		DYER'S OFFICE
67	1	Dianolite color matching light
68	1	Small lab refrigerator
69	1	Desk
69a	1	Chair
70	1	Thermolyne hotplate
71	1	Fedders Window air conditioner
72	1	Fedders Window air conditioner
73	1	Small s/s lab sink
74	1	Desk
74a	1	Chair
		DRUG ROOM
75	1	Fairbanks portable beam scale
76	1	Toledo Model 3-111 250-gram scale
77	1	Fairbanks 100 lb. X 1/10 graduation dial bench scale
78	1	Budgit ½-ton manual hoist
79	1	Emergency eyewash and shower
80	1	Toledo Dye Scale with digital readout
		DYE HOUSE AREA
81	1	Merrow Model 70-D3B(c) s/n 175241
82	1	" 70-D3B s/n 184052
83	1	" 70-D3B(cp) s/n 216191
84	1	" 70-D3B(c) s/n 208173
85	1	" 70-D3B(c) s/n 208187
86	1	" 70-D3B s/n 189331
87	1	" 70-D3B s/n 181742
88	1	" 70-D3B s/n 174228
89	1	" 70-D3B(c) s/n missing
90	1	" 70-D3B s/n 193410
91	1	" 70-Y3B s/n 215822
92	1	" 70-Y3B s/n 215824
93	1	" 70-Y3B s/n 215823
94	1	" 70-D3B s/n 213441
95	1	" 70-D3B s/n 191752

Lot #	Quantity	Item		
96	1	"	70-D3B	s/n 192842
97	1	"	M-2DR-2	s/n 124087
97a	1	"	70-D3B	s/n 178923
97b	1	"	70-D3B	s/n 187128
98	1	"	60-B3B	s/n 80935
99	1	"	60-B3B	s/n 74308
100	1	Merrow Model (stripped)	60-Y3B	s/n 115556
101	1	Merrow Model	60-D3B	s/n 78759
102	1	"	60-D3B	s/n 110672
103	1	"	60-D3B	s/n 50668
103a	1	"	60-D3B	s/n missing
103b	1	"	60-D3B	s/n 115764
103c	1	"	60-D3B	s/n 115762
104	1	Singer Model 31-15 s/n missing		
105	1	Clark battery-operated 6,000 lb. electric pallet truck with batteries		
106	1	Langley hydraulic beam lift		
107	1	BT 4,500 lb. manual pallet jack		
108	1	Langley hydraulic pallet jack		
108a	1	Barrett 3,000 lb. pallet truck		
108b	1	BT 4,500 lb. manual pallet jack		
108c	1	Blackhawk 3,000 lb. hydraulic roll truck		
108d	1	BT 4,500 lb. manual pallet jack		

HALLWAY (Next to stairs)

109	1	Portable Oxygen welding set
110	1	Portable electric welder, Clark

FRAME ROOM

111	1	Two stacks of 10 each s/s dry cans, 60'' X 23'' face, manufactured by Carroll, cans rated at 50psi. Note: second stack of 10 are teflon coated. Cans are chain driven.
112	1	84'' Gas-fired predryer (Located in pit), six burner with Aztec burners

Lot #	Quantity	Item
113	1	Lightning gear head, 1/3hp mixer
114	1	S/S Tank, 40'' diameter X 50'' deep
115	1	"
116	1	"
117	1	Power belt conveyor with 30'' wide belt X 40' long; conveyor services first floor to second floor
118	1	½-ton Electric C & M chain fall hoist

Finishing Range (Lot #119 - #141)

119	1	Lightning straight ½hp mixer
120	1	S/S Tank, 38'' diameter X 42'' deep
121	1	Lightning gear mixer, 1/3hp
122	1	S/S Tank, 38'' diameter X 42'' deep
123	1	Small Lightning straight mixer
124	1	S/S Tank, 36" diameter X 36" deep
125	1	Lightning geared mixer
126	1	S/S Tank, 36" diameter X 36" deep
127	1	Graco barrel pump, Type 84
128	1	S/S Tank, 42" diameter X 46" deep
129	1	72" Prebrushing unit with American fan suction system
130	1	60" Microset Padder, rubber to s/s rolls, approximately 20" diameter, padder has air guiders, 25hp D.C. motor, compensator
131	1	Aztec gas-fired predryer, 70'' wide, 8-burner
132	1	72" two-station coater, first station coats face of goods, second station coats back side of goods; both units have Hydroalign guiding systems; unit has air guides at entry
133	1	Textile foamer, Model SHNG-DC, s/n 497, 1979
134	1	Textile foamer, Model SHNG-DC, s/n 498, 1979

Lot #	Quantity	Item
135	1	Marshall & Williams clip tenter frame, Model F7DF, s/n 3875; Note: frame was altered September 1978 by M&W; frame is 120′ long X 72″ wide with M&W roller chain; housing is gas-fired with 3 penthouses; housing is 6′ long with exception that housing is approximately 12′ high at each of the penthouses; tenter motor is 40hp 230V D.C.
135a	1	LeRoi 5hp air compressor, 208/230V with A.C.
136	1	Lanly 72″ roller-curer, approximately 22′ long X approximately 10′ high with Eclipse gas equipment; unit has 16 rolls on bottom and 17 V-belt driven rolls on top
137	1	72″ combination compensator and brushing unit; brushing unit has pneumatically operated brushes; unit has 2 Morrison dry cans with 50psi
138	1	Two-roll 72″ rubber/stainless Nip; Note: Nip has very light air cylinders. Approximately 1-ton Nip has 15hp 230V gear head motor
139	1	72″ Pneumatic accumulator with bow roll entry; accumulator has 15 rolls
140	1	″
141	1	Menzel A-frame batcher, Type 72SB, s/n 02395, 11/78
		————End Finishing Range————
142	1	Two-roll padder, 72″ face, rubber to rubber (out of production in corner — condition unknown)

INSPECTION ROOM
FIRST FLOOR

Lot #	Quantity	Item
143	1	72″ Homemade inspection machine with dual durant yardage clocks; units are driven by Reliance power matched drives, 180V 1½hp motor, 1,750 rpm connected Morse 2.26hp, 5/1 ratio gear reducer
144	1	″
145	1	72″ Homemade inspection machine with dual durant yardage clocks; units are driven by Reliance power matched drives, 180V 1½hp motor, 1,750rpm connected, Morse 2.26hp, 5/1 ratio gear reducer
146	1	″
147	1	″
148	1	″
149	1	″
150	1	″
151	1	″
152	1	″
153	1	60″ rubber/stainless microset padder
154	1	Four-roll homemade 60″ brushing unit with 25hp motor and collection system
155	1	70″ homemade sander with air guiders driven by 7½hp motor; unit is coupled to a wire brush before exit
156	1	Water cooler
157	1	Power belt conveyor, 42″ wide X 88′ long

INSPECTION/RETAIL ROOM FIRST FLOOR
(Rear of Inspection Room First Floor)

Lot #	Quantity	Item
157a	1	46″ double-fold and board machine
157b	1	Werner 68″ Tube To inspection unit with U. S. Veri-drive and yardage clock, s/n 2211
157c	1	Water cooler
157d	1	Pitney Bowes Model 3770 postage scale
157e	1	Tape Shooter
157f	1	IBM electric typewriter
157g	1	Olivetti adding machine

INSPECTION PUT-UP
SECOND FLOOR

158	1	60″ Tuber
159	1	72″ Swing folder and draw-off stand
160	1	65″ Two-roll inspection and rolling machine; has 3 yardage counters
161	1	65″ Two-roll inspection and rolling machine; has 3 yardage counters; without inspection board
162	1	″
163	1	″
164	1	″
165	1	″
166	1	″
167	1	″
168	1	″
169	35	Four-wheel steel trucks, 36″ wide X 60″ long X 50″ high, with 3 shelves
170	1	Budget ½-ton electric chain hoist
171	1	Menzel A-frame, 16″ diameter X 72″ face

Lot #	Quantity	Item
172	1	″
173	1	″
174	1	″
175	1	″
176	1	″
177	1	″
178	1	″
179	1	″
180	1	″
181	1	″
182	1	″
183	1	Menzel A-frame, 16″ diameter X 72″ face
184	1	″
185	1	″
186	1	″
187	1	″
188	1	″
189	1	″
190	1	″
191	1	″
192	1	″
193	1	″
194	1	″
195	1	″
196	1	″
197	1	″
198	1	″
199	1	″
200	1	″
201	1	″
202	1	″
203	1	″
204	1	″
205	1	″
206	1	″

Lot #	Quantity	Item
207	1	Menzel A-frame, 16″ diameter X 72″ face
208	1	″
209	1	″
210	1	Menzel A-frame Jack handle
211	1	″
212	1	″
213	1	Water cooler
214	1	Clark battery-operated pallet truck with one Atlantic Battery Company charger; 4,000 lb. capacity
215	1	55′ Grouping of roller conveyor; section are: 33″ X 8′ straight, one 12′ curved section, one 25′ curved section, one 10′ straight section
216	1	Interlake strapping system with Central scale Model F784-3; s/n 1192; has one 5′ power belt conveyor and one 15′ power belt conveyor with two 5′ hydraulic lifting sections

PACKING AND SHIPPING
OFFICE SECOND FLOOR

217	1	Olivetti adding machine
218	1	IBM electric typewriter
219	1	Chair, secretarial
220	1	Metal desk
221	1	IBM electric typewriter
222	1	Armchair
223	1	Metal desk
224	1	Olivetti adding machine
225	1	Metal desk
226	1	IBM electric typewriter
227	1	Metal desk
228	1	Two-drawer file

Lot #	Quantity	Item
229	1	Small corner desk
230	1	Olivetti adding machine
231	1	Armchair
232	1	Metal desk
233	1	Four-drawer file
234	1	Casio electric calculator (no tape)
235	1	Four-drawer metal file
236	1	″
237	1	″
238	1	″
239	1	Tub file
240	1	Three (3) Tape shooters
241	1	IBM electric typewriter
242	1	Pitney Bowes Model 1502 Marking Machine
243	1	Olympia adding machine
244	1	IBM electric typewriter
245	1	Metal desk
246	1	Metal desk
247	1	Miida adding machine
248	1	Window air conditioner, Fedders
249	1	FMC strapping machine

SAMPLE ROOM SECOND FLOOR

250	1	Pitney Bowes, Model 3770 postage scale
251	1	Olivetti adding machine
251a	1	Olivetti adding machine
252	1	Tape shooter
253	1	IBM electric typewriter
254	1	Pitney Bowes, Model RFPS postage unit for UPS
255	1	IBM electric typewriter
256	1	Marsh ¾″ stencil machine
257	1	8″ sample swatch cutter

ENGINEERS' OFFICES
SECOND FLOOR

Lot #	Quantity	Item
258	1	4-drawer metal file
259	1	"
260	1	"
261	1	"
262	1	6-drawer metal sample file
263	1	4-drawer metal file
264	1	"
265	1	"
266	1	Small corner desk
267	1	Chair, secretarial
268	1	Metal desk
269	1	"
270	2	6-shelf metal storage cabinet
271	1	2-door steel storage cabinet
272	2	Armchair
273	2	Straightback chair
274	2	4-shelf metal bookcase
275	1	Armchair
276	1	Metal desk

LABORATORY SECOND FLOOR

277	1	Water cooler
278	4	5-shelf open steel storage units
279	1	Flammability tester
279a	1	Laboratory storage cabinet
280	1	Elmendorf tearing tester
281	1	Moisture monitor
282	1	Pyrometer
283	1	Emergency eye wash and shower
284	1	3-tier laboratory dryer/conditioner, homemade
285	1	Precision Scientific lab oven
286	1	Sears dryer
287	1	Sears washer

Lot #	Quantity	Item
288	1	Scott tester, Model DH2, s/n B4822
289	1	Abrasion tester, Model CS-59-184
290	1	Magnifying light
291	1	Atlas Crockmeter
292	1	12" Twist counter
293	1	4-drawer metal file
294	1	"
295	1	Launder-meter, 1950
296	1	Laboratory bench with two sinks
297	1	Orion Analog Ph meter, Model 301
298	1	Kitchenaide mixer
299	1	Ohaus Model 2610 scale
300	1	VWR magnetic stirrer
301	1	Lindberg heavy duty hotplate
302	1	Ohaus Model 3090A
303	1	Manson 4-burner countertop gas stove
304	1	3-section laboratory single piece desk unit with 12 locking drawers
305	1	Singer sewing machine
306	1	Sharp desktop copier
307	1	25" Paper cutter
308	1	16-drawer wooden sample cabinet
309	1	MacBeth colormatching lamp
310	1	4-drawer metal file
310a	1	"
310b	1	"
311	1	Renigal lab dye unit
312	1	14" 2-roll rubber/stainless lab padder, motorized
313	1	Ross laboratory curing oven, maximum temperature 650°F, approximate holding capacity 3 yards
314	1	Bock laboratory extractor, 16"
315	1	Circular 2" swatch cutter
316	1	30-gram over-and-under scale

Lot #	Quantity	Item
317	1	Chair
318	1	Metal desk
		LABORATORY CONFERENCE ROOM SECOND FLOOR
319	1	Stokes automatic water still, 1½ gallon capacity, model 171F
320	1	Atlas Fade-ometer, Type FDA-R, s/n FO2929, 1954
321	1	Two easels and one wallboard
322	1	Folding table and 12 folding chairs
323	1	Rheem 120-gallon hot water heater
		SECOND FLOOR
324	1	Ludell heat recovery unit, s/n 5616, 5/76, 4-tier unit
		TIN SHOP SECOND FLOOR
325	1	General Electric arc welder, Model 33, s/n 6WD33B3
326	1	Metal brake, 7′
327	1	Electric metal saw
328	1	Metal brake, 4′
329	1	Peck/Wilcox edging unit
330	1	3′ 3-roll hand operated metal rolling unit
331	1	Vertical Walker-Turner band saw
		CUTTING AND INSPECTING THIRD FLOOR
332	1	72″ homemade inspection unit with let-off stand and 2-roll pneumatic winder; unit has air guiders and yardage clock; driven by Reliance 2 hp, 230/460V, 1165rpm; and reducer
333	1	66″ homemade inspection unit with let-off stand, yardage clock, single roll winder; driven by Baldor 2hp, 230/460V, 1,140rpm

Lot #	Quantity	Item
334	1	56″ homemade inspection unit with let-off stand, driven by Reliance 2hp, 230/460V, 1,165rpm
335	1	72″ homemade inspection unit with let-off stand, yardage clock, single roll winder; driven by Baldor 2hp, 230/460V, 1,140rpm
336	1	66″ homemade inspection unit with let-off stand, yardage clock, single roll winder; driven by Reliance 2hp, 230/460V, 1,165rpm
337	1	½-ton Budgit electric chain fall hoist
338	1	″
339	1	72″ Firsching cutting machine, Style 72EHW, s/n 790
340	1	″ Style 72EHW, s/n 791
341	1	72″ West Point Cutting Machine Order No. B726042
342	1	″ Order No. B72604J
343	1	″ No number
344	1	″ No number
345	1	West Point corduroy cutting machine with collection system and hydraulic drive, Order No. C-12278
346	1	72″ Firsching cutting machine Style 72EHW, s/n 783
347	1	58″ Firsching cutting machine, No number
348	1	″ Style 58E, s/n 358
349	1	72″ Fersching cutting machine, No numbers
350	1	″ Style 725EHW, s/n 779

Lot #	Quantity	Item
351	1	58'' Fersching cutting machine, Style 58E, s/n 346
352	1	" Style 58E, s/n 352
353	1	" No numbers
354	1	" No numbers
355	1	" No numbers
356	1	" No numbers
357	1	" No numbers
358	1	" No numbers
359	1	" No numbers
360	1	" Style 58ES, s/n 477
361	1	" Style 58ES, s/n 464
362	1	" Style 58ES, s/n 382
363	1	" Style 58ES, s/n 383
364	1	" Style 58ES, s/n 469
365	1	Water cooler
366	1	1-ton Yale electric chain hoist
367	1	½-ton Budgit electric hoist
368	1	58'' Fersching cutting machine, Style 58ES, s/n 471
369	1	63'' Fersching cutting machine, Style 63EHW, s/n 687

Lot #	Quantity	Item
370	1	58'' Fersching cutting machine, Style 58ES, s/n 475
371	1	63'' Fersching cutting machine, Style 63EHW, s/n 688
372	1	½-ton Yale electric chain hoist
		CUTTING ROOM REAR SHOP THIRD FLOOR
373	1	Dayton bench grinder
374	1	Delta drill
		CUTTING ROOM OFFICE
375	1	Small metal desk
376	1	Metal desk
		AIR COMPRESSOR ROOM FIRST FLOOR
377	1	Ingersoll Rand air compressor, 25hp, 550V, 3-stage, Model 20T, s/n 30T-287348
378	1	Ingersoll Rand air compressor, 20hp, 550V, 3-stage, Model 20TE, s/n 30T-221199
379	1	Worthington air compressor, 10'' X 11'', s/n 62518; unit is dismantled
		MACHINE SHOP
380	1	Horizontal 12'' hacksaw
381	1	Atlas drill press
382	1	Rockwell drill press
383	1	Wells power band saw
384	1	Water cooler
385	1	Cincinnati No. 3 horizontal milling machine
386	1	½hp grinder
387	1	No. 4 arbor
388	1	2hp grinder

Lot #	Quantity	Item
389	1	Invicta horizontal cutter
390	1	Belt-driven lathe, 36' bed
391	1	1/3hp bench grinder
392	1	Acetylene torch set
393	1	Lincoln Model AC250 welder
394	1	Hendey lathe, 36'' bed
395	1	Belt-driven lathe by Freed
396	1	Belt-driven long bed lathe, incomplete
397	1	Fitchberg long bed belt-driven lathe

GREEN BUILDING

Back Sizing Range

398	-	72'' Cloth cradle, 7 rolls, sky stand having 3 72'' s/s rolls
399	1	Mt. Hope 90'' Scray with motor drive, two roll 108'' Mt. Hope floating roll guiders
400	1	Homemade 82'' rubber roll coater, applicator has air guiders
401	1	Set of 6 72'' belt-driven dry cans by Greenville Steel, 90psi at 331°F, 1979
401a	1	Set of 6 72'' belt-driven dry cans by Greenville Steel, 90psi at 331°F, 1979
401b	1	Set of 12 72'' belt-driven dry cans by Greenville Steel, 90psi at 331°F, 1979
402	1	72'' three-roll Parkinson batcher, s/n 7268
403	1	Lightning straight mixer
404	1	Lightning straight mixer
405	1	S/S tank, 30'' diameter X 56'' deep
406	1	S/S tank, 30'' diameter X 56'' deep

- - - End Back Sizing Range - - -

407	1	Ingersoll Rand 3-stage air compressor, 25hp, Model 30T 425712, s/n 25T2

Lot #	Quantity	Item
408	1	Trimming Range consisting of one entry let-off stand with 3-roll 72'' cradle, air guiders by Tandmatic entering into a 72'' edge trimming machine (manufacturer unknown), equipped with Fife guiders and suction unit entering into Lot #409
409	1	Parkinson 72'' 2-roll windup unit without knife, s/n 72-429
410	1	1-ton Budgit manual hoist
411	1	Three-roll 72'' cradle and let-off stand with air guiders entering into homemade brush unit then entering into Lot #412
412	1	L & W 72'' 3-roll Batcher with cut-off
413	1	Three-roll 72'' cradle with let-off stand with air guiders entering into homemade brush unit then entering into Lot #414
414	1	Parkinson 72'' 2-roll windup unit without knife, s/n 72-429
415	1	½-ton Budgit manual hoist
416	1	Water cooler
417	1	Re-rolling unit consisting of 72'' re-roll cradle and let-off stand, air guiders and 2-roll 64'' winder
418	1	Yale 2,000 lb. fork lift, Model G82C O25HFT (damaged)
419	1	Datsun FG103, 2,350 lb. capacity fork lift
419a	1	Datsun 3,000 lb. fork lift, Model CF6 103-1
420	1	Towmotor fork lift, plate missing, truck not running (damaged)
421	1	1-ton Budgit manual chain hoist

REAR YARD CONTINUOUS RANGE TANKS

422	1	Hydrogen Peroxide storage tank 6' deep X 48'' diameter

Lot #	Quantity	Item
423	1	Hydrogen Peroxide storage tang 6' deep X 48'' diameter
424	1	Hydrogen Peroxide storage tank, vertical type

MAIN OFFICE — RECEPTION AREA

425	1	Metal desk
426	1	Burroughs calculator with weight
427	1	IBM Selectric III typewriter
428	1	Steno chair
429	1	2-drawer file cabinet
430	1	Simplex time clock

MAIN OFFICE — HALLWAY CLOSET

431	1	IBM Selectric (damaged)

MAIN OFFICE — SALES OFFICE

432	1	IBM Selectric
433	1	4-drawer file cabinet
434	1	4-drawer lateral file cabinet
435	1	"
436	1	"
437	1	"
438	1	"
439	1	Burroughs calculator
440	1	Steno chair
441	1	Metal desk
442	1	Steno chair
443	1	Metal Desk
444	1	Steno chair
445	1	IBM Selectric typewriter
446	1	Metal Desk
447	1	2-drawer metal tub file
448	1	Siemens Telex Unit
449	1	Armchair

Lot #	Quantity	Item
450	1	Casio Adding machine
451	1	5-drawer card index file
452	1	4-drawer lateral file
453	1	Metal Mini-rack
454	1	Metal desk
455	1	Steno chair
456	1	Miida adding machine
457	1	IBM Selectric typewriter
458	1	IBM Selectric II typewriter
459	1	Steno chair
460	1	Metal desk
461	1	Steno chair
462	1	2-door metal storage cabinet
463	1	Casio adding machine

MAIN OFFICE — PRESIDENT'S OFFICE

464	1	Sample rack
465	1	Executive wood desk and corner work table
466	1	Armchair
467	1	Upholstered lounge chair
468	1	Chrome and glass 36'' X 36'' table
469	1	Wood-grain wall unit including storage, shelving, and built-in desk unit
470	1	Nine (9) armchairs
471	1	Round conference table

MAIN OFFICE — CHASE'S OFFICE

472	1	Mosler Safe
473	1	Two (2) 2-drawer lateral files
474	1	Executive wood desk, including credenza and corner work table
475	1	Steno chair
476	1	Armchair
477	1	Armchair, walnut
478	1	Metal straightback chair
479	1	Sample rack

MAIN OFFICE — ACCOUNTING ROOM

Lot #	Quantity	Item
480	1	4-drawer lateral file (slightly damaged)
481	1	"
482	1	"
483	1	Selectric typewriter
484	1	Metal desk, including typewriter stand and work table
485	1	2-drawer metal file cabinet
486	1	Casio adding machine
487	1	Steno chair
488	1	Casio adding machine
489	1	Steno chair
490	1	Metal desk
491	1	Pitney - Bowes Touchmatic Postage meter, Model 5705
492	1	Metal Mini-rack
493	1	Armchair
494	1	Steno chair
495	1	Armchair
496	1	Metal desk
497	1	4-drawer lateral file
498	1	"
499	1	2-drawer file cabinet
500	1	2-shelf storage cabinet
501	1	Steno chair
502	1	Burroughs check writer
503	1	Metal secretarial desk with typing return
504	1	Casio adding machine
505	1	2-drawer metal file cabinet
506	1	Steno chair
507	1	Metal desk
508	1	Adler electric typewriter
509	1	Steno chair

Lot #	Quantity	Item
510	1	Metal desk
511	1	Casio adding machine
512	1	Oxford metal hanging file

MAIN OFFICE — CONTROLLER'S ROOM

513	1	4-drawer lateral file
514	1	"
515	1	Metal Mini-rack
516	1	Selectric typewriter
517	1	Armchair
518	1	Steno chair
519	1	Metal desk
520	1	Chair
521	1	Casio adding machine

MAIN OFFICE — BASEMENT STORAGE ROOM

522	1	4-drawer fireproof file cabinet
523	1	2-drawer file cabinet
524	1	4-drawer lateral file
525	1	4-drawer metal file cabinet
526	1	4-drawer metal file cabinet (legal size)
527	1	Metal desk
528	1	Metal desk
529	1	4-drawer lateral file
530	1	4-drawer lateral file
531	1	Armchair

MAIN OFFICE — MAIL ROOM

532	1	Pitney Bowes postage meter
533	1	Pitney Bowes postage meter
534	1	Xerox 4500 Copier s/n 533 910985 (checking lease)

MAIN OFFICE — PRESIDENT'S SECRETARY

Lot #	Quantity	Item
535	1	Metal secretarial desk with typing return
536	1	5-drawer lateral file cabinet
537	1	5-drawer lateral file cabinet
538	1	4-drawer lateral file cabinet
539	1	Steno chair

MAIN OFFICE — HALLWAY

540	1	Oasis water cooler (may stay with building as it is wall model)

MAIN OFFICE — DIRECTOR OF FINANCE

541	1	2-drawer file cabinet
542	1	Armchair
543	1	Armchair
544	1	Straightback chair
545	1	Metal desk
546	1	Burroughs adding machine
547	1	Projector

MAIN OFFICE — COMPUTER ROOM

548	1	4-drawer metal file cabinet
549	1	2-door metal storage cabinet
550	1	Steno chair
551	1	IBM System 32 Computer (checking lease)
552	1	Steno chair
553	1	Metal desk
554	1	2-drawer metal tub file
555	1	IBM Selectric typewriter
556	1	Burroughs adding machine
557	1	IBM 3741 Data Station (checking lease)
558	1	Portable metal stationery storage unit
559	1	Two (2) metal Mini-rack

MAIN OFFICE — CLOTH CONTROL/BASEMENT

Lot #	Quantity	Item
560	1	Armchair
561	1	Metal desk
562	1	4-drawer metal file cabinet
563	1	Steno chair
564	1	Metal desk
565	1	Metal desk
566	1	Steno chair
567	1	IBM Selectric
568	1	Armchair
569	1	Siemens Telex Unit
570	1	4-drawer lateral file
571	1	Steno chair
572	1	Metal desk (damaged handle)
573	1	Armchair
574	1	Metal desk
575	1	Steno chair
576	1	IBM Electric typewriter
577	1	4-drawer metal file cabinet, lateral
578	1	"
579	1	"
580	1	Xerox No. 3107 Reduction Copier (checking lease)

GENERAL

1	Approximately 65 fire extinguishers
1	Approximately 12 electric floor fans
1	Approximately 12 small electric fans
1	Approximately 20 ladders
1	Approximately 33 hand trucks
1	Approximately 7 barrel trucks
1	Approximately 40 s/s ladles
1	Approximately 11 s/s pails
1	Approximately 630 Wooden cores

———

SCHEDULE B

1. One IBM Model System 32/5320 with Data Station Model 3741.
2. Machinery and equipment presently stored in the so-called "green building."
3. All machinery and equipment subject to lease held by parties other than MCRC.
4. Furniture and office equipment in the office formerly occupied by Leonard M. Ansin.
5. Automobiles or motor vehicles subject to certificates of title.

GC Ex. #3

THE COMMONWEALTH OF MASSACHUSETTS
Office of the Secretary of State
State House, Boston 12133

September 27, 1982

MICHAEL JOSEPH CONNOLLY
Secretary Of State

To Whom it May Concern:

I hereby certify that Fall River Dyeing & Finishing Corp. appears by the records of this office to have been incorporated under the general laws of this Commonwealth August 31, 1982

I further certify that so far as appears of record here, said corporation still has a legal existence.

IN TESTIMONY of which, I have hereunto affixed the Great Seal of the Commonwealth on the date first above written.
Michael Joseph Connolly
Secretary of State

(SEAL)

THE COMMONWEALTH OF MASSACHUSETTS
Office Of The Massachusetts Secretary Of State

MICHAEL JOSEPH CONNOLLY, Secretary
One Ashburton Place, Boston, Mass. 02108

ARTICLES OF ORGANIZATION
(Under G.L. Ch. 156B)
Incorporators

NAME POST OFFICE ADDRESS

Include given name in full in case of natural persons; in case of a corporation, give state of incorporation

Denise Murphy 11 Tontine Street
W. Medford, MA 02155

The above named incorporator(s) do hereby associate (themselves) with the intention of forming a corporation under the provisions of General Laws. Chapter 156B and hereby state(s).

1. The name by which the corporation shall be known is: Fall River Dyeing & Finishing Corp.

2. The purpose for which the corporation is formed is as follows:

   A. To own a dyeing and finishing plant and equipment and to engage in the business of dyeing and finishing.

   B. To carry on any business or other activity which may be lawfully carried on by a corporation organized under the business corporation law of the Commonwealth of Massachusetts, whether or not relating to those referred to in the foregoing paragraph.

3. The total number of shares and the par value, if any, of each class of stock within the corporation is authorized as follows:

	Without Par Value	With Par Value	
Class of Stock	Number of Shares	Number of Shares	Par Value Amount
Preferred			$
Common	12,500		

4. If more than one class is authorized, a description of each of the different classes of stock with, if any, the preferences, voting powers, qualifications, special or relative rights or privileges as to each class thereof and any series now established:

   None

5. The restriction, if any, imposed by the Articles of Organization upon the transfer of shares of stock of any class are as follows:

   None

6. Other lawful provisions, if any, for the conduct and regulation of business and affairs of the corporation, for its voluntary disolution, or for limiting, defining, or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders:

   A. Meetings of shareholders may be held anywhere in the United States pursuant to M.G.L. Ch. 156B, § 35.

   B. The directors of the corporation may amend the by-laws.

   C. The corporation may be a partner pursuant to M.G.L. Ch. 156B, § 9A

   If there are no provisions state "None."

7. By-laws of the corporation have been fully adopted and the initial directors, president, treasurer and clerk, whose names are set out below, have been duly elected.

8. The effective date of organization of the corporation shall be the date of filing with the Secretary of the Commonwealth or if later date is desired, specify date (not more than 30 days after the date of filing)

9. The following information shall not for any purpose be treated as a permanent part of the Articles of Organizations of the corporation.

   a. *The post office* address of the *initial principal office* of the corporation of Massachusetts is:

      11 Beacon Street, Suite 1205, Boston, MA 02108

   b. The name, residence, and post office address of each of the initial directors and following officers of the corporation are as follows:

President: Denise Murphy, 11 Tontine St. W. Medford, MA 02155, Same.

Treasurer: Margaret Keith, 91 Harvard Ave., Brookline, MA 02146, Same.

Clerk: Peter Belmonte, 32 Crestview Dr., Malden, MA, Same.

Directors: Denise Murphy, 11 Tontine St., W. Medford, MA 02155, Same. Margaret Keith, 91 Harvard Ave., Brookline, MA 02146, Same. Peter Belmonte, 32 Crestview Dr., Malden, MA. Same.

c. The date mutually adopted on which the corporation's fiscal year ends is December 31.

d. The date initially fixed in the by-laws for the annual meeting of stockholders of the corporation is April 15.

e. The name and business address of the resident agent, if any, of the corporation is None.

IN WITNESS WHEREOF and under the penalties of perjury the INCORPORATIONS (agents) of these Articles of Orgam attest this 21st day of August, 19.....

(Illegible)

THE COMMONWEALTH OF MASSACHUSETTS
ARTICLES OF ORGANIZATION
GENERAL LAWS, CHAPTER 1568, SECTION 12

I hereby certify that, upon an examination of the within written articles of organization, duly submitted to me, it appears that the provisions of the General Laws relative to the organization of corporations have been complied with, and I hereby approve said articles, and the filing fee in the amount of $....., having been paid, said articles are deemed to have been filed with me this .....day of ....., 19.....
Effective date

MICHAEL JOSEPH CONNOLLY

Secretary of State

PHOTO COPY OF ARTICLES OF ORGANIZATION
TO BE SENT TO BE FILLED IN BY CORPORATION

To:

Michael W. Merrill, Esq.
11 Beacon Street, Suite 1205
Boston, MA 02108
Telephone 523-1760

(Illegible)

GC Ex. #4

ASSIGNMENT

MARCAMY SALES CORPORATION hereby assigns to FALL RIVER DYEING & FINISHING CORP. all of its right, title and interest in and to and rights and obligations pursuant to that certain Agreement dated August 30, 1982 by and among Marcamy Sales Corporation, Lila M. Ansin and Massachusetts Capital Resource Co., effective immediately.

Dated: New York, New York
September 2, 1982

MARCAMY SALES CORPORATION

/s/ By Arthur M. Friedman, President

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 2nd day of September, 1982, before me came Arthur M. Friedman, to me known, who being by me duly sworn did depose and say that he resides at 2 Windsong Road, Ardsley, New York 10502, that he is the President of Marcamy Sales Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

EVELYN GOGOL
Commissioner of Deeds
City of New York—No. 1—1868
Certificate filed in New York County
Commission Expires February 1, 1983

GC Ex. 5

ASSIGNMENT

FALL RIVER DYEING & FINISHING CORP. hereby assigns to 168 STEVENS STREET REALTY CORP. all of the rights FALL RIVER DYEING & FINISHING CORP. has, pursuant to the Agreement dated August 30, 1982 among Lila M. Ansin, Massachusetts Capital Resource Co. and Marcamy Sales Corp., to purchase the Premises as defined in said Agreement.

Dated: New York, New York
September 16, 1982

FALL RIVER DYEING &
FINISHING CORP.

/s/ By Arthur M. Friedman, President

Acknowledgment

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On this 16th day of September, 1982, before me personally came Arthur M. Friedman, to me known, who being by me duly sworn did depose and say that he resides at 2 Windsong Road, Ardsley, New York; that he is the President of Fall River Dyeing & Finishing Corp. the corporation described in, and which executed the above assignment; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

/s/ MARJORIE GAMZON
Notary Public, State of New York
No. 24-6453235
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1984

GC Ex. #6

BOOK 1406 FACE 12
LILA H. ANSIN

of 4330 Hillcrest Avenue, Hollywood Broward, County, Florida being unmarried, for consideration paid, and in full consideration of $325,000.00 grants to 168 STEVENS STREET REALTY CORP., a corporation and existing under the law of Massachusetts with a principal place of business in Bristol County, Massachusetts with quitclaim covenants the land in FALL RIVER, BRISTOL COUNTY, MASSACHUSETTS

(Description and encumbrances, if any)

SEE APPENDIX A FOR DESCRIPTION

Being the same premises conveyed to me by Foreclosure Deed of Lila H. Ansin, holder of a mortgage from Leonard M. Ansin to Lila H. Ansin, dated August 30, 1982 and recorded in the Bristol County Fall River District Registry of Deeds in Book 1404 Page 197.

Said premises are conveyed subject to any and all (1) provisions of existing building and zoning law; (2) unpaid taxes, tax titles, assessments, Municipal Liens, water and sewer charges.

Witness my hand and seal this 10th day of September 1982 /s/ Lila H. Ansin.

The Commonwealth of Massachusetts
Suffolk ss. September 10, 1982

Then personally appeared the above-named Lila H. Ansin and acknowledged the foregoing instrument to be her free act and deed before me.

/s/ Ditch M. Sawyer
Notary Public

My commission expires May 12, 1982

Exhibit A

PARCEL I: Beginning at a point at the Northwesterly corner of the premises to be described, which point is located on the Easterly side of Stevens Street, three hundred ninety-six and 17/100 (396.17) feet. Southerly from a stone bound at the Southeasterly corner of the intersection of said Stevens Street, with a proposed extension of Brayton Avenue; thence running EASTERLY at right angles to Stevens Street from said point of beginning, one hundred six (106) feet for a corner; thence turning and running SOUTHERLY to the Westerly side of the entrance to the building formerly known as the No. 1 Mill of the Stevens Manufacturing Company; and continuing Southerly along the face of the brick wall of the entrance to said No. 1 Mill so-called, and the ell of the said No. 1 Mill Building to the southwesterly corner of said ell; and thence running SOUTHEASTERLY to the northeasterly corner of the loading platform; and thence turning and running SOUTHERLY along the Easterly side (exterior) of said platform so that the entire platform is within the granted premises; and running thence SOUTHERLY from the extreme Southeasterly corner of said loading platform to a point twenty-five (25) feet Northerly from the contemplated extension of Denver Street, which point is one

hundred thirty (130) feet Easterly from Stevens Street: thence turning and running parallel with the Northerly line of said contemplated Denver Street and twenty-five (25) feet distant therefrom, Westerly, one-hundred thirty (130) feet to Stevens Street for a corner; thence turning and running NORTHERLY by said Stevens Street, seven hundred ninety-eight and 33/100 (798.33) feet to the point of beginning, containing, in area, approximately ninety-six thousand five hundred fifty-one (96.551) square feet, more or less.

PARCEL 2: Beginning at the Southwesterly corner of the premises to be described at a point where the said premises join with Parcel 1 — above, and at a point where the Southwesterly corner of the premises to be described makes an acute angle with the Northeasterly corner of the loading platform, so-called; thence running EASTERLY by the face of the brick wall fifty-two feet, ten inches (52' 10") to the center line of another brick wall; thence turning and running NORTHERLY by the Center line of said brick wall, thirty-seven feet, six inches (37' 6") to the center line of another brick wall; then turning and running WESTERLY thirteen feet, two inches (13' 2") to the center line of another brick wall; thence turning and running NORTHERLY by said last named center line, five feet, three inches (5' 3") to the center line of an interior brick wall; thence turning and running WESTERLY by said center line thirty-nine feet, four inches (39' 4") to the westerly face of another brick wall and said Parcel 1 above; thence turning and running SOUTHERLY by said Parcel 1, and by the Westerly face of said brick wall, forty-two feet, nine inches (42' 9") to the point of beginning. The parcel

hereby described being the ell of the building formerly known as the No. 1 Mill of the former Stevens Manufacturing Co., all as shown on a "Plan of property to be conveyed to Thomas French & Sons, Ltd. by Rost Realty Co. at Fall River, Massachusetts, drawn by James J. McCann, dated December 1, 1947", which plan is recorded in Bristol County, Fall River District Registry of Deeds, Plan Book 20, Page 68.

Together with all appurtenances thereunto belonging, and subject to exceptions, reservations, rights, easements, and privileges described in two (2) deeds to Thomas French & Sons, Ltd. from Rost Realty Co., the first dated October 9, 1945, and recorded in said Registry, Book 471, Pages 271-3; and the second dated December 23, 1947, recorded in said Registry, Book 495, Pages 19-23.

Together with all buildings and structures now upon the above-described premises, belonging to the Grantor and all improvements thereon; all fixtures, appliances and equipment used in connection with said buildings or with any of them or with any portions of said premises, and now situated thereon, and all other rights, if any, belonging to this Mortgagor as appurtenant to the above-described premises.

Being the same premises conveyed to Lila H. Ansin by Bangor Punta Operations, Inc., by deed dated March 6, 1970, recorded with said Registry of Deeds in Book 976, Page 10.

PARCEL 3: Beginning at a point at the NORTHWESTERLY corner of the land to be described, which point is located on the EASTERLY side of Stevens Street

Three Hundred Forty-eight and 17/100 (348.17) feet SOUTHERLY from a stone bound at the SOUTHEASTERLY corner of the intersection of said Stevens Street with a proposed extension of Brayton Avenue; thence running SOUTHERLY by said Stevens Street Forty-eight (48) feet for a corner; there making a right angle and running EASTERLY by land now or formerly of Thomas French & Sons, Ltd., One Hundred Six (106) feet for a corner; there making a right angle and running SOUTHERLY to the WESTERLY side of the entrance to the building formerly known as the No. 1 Mill of Stevens Manufacturing Company, and continuing SOUTHERLY along the face of the brick wall of the entrance to said No. 1 Mill, so called, to the center line of an interior brick wall of the ell of the No. 1 Mill Building; thence turning and running EASTERLY by said center line Thirty-nine (39) feet Four (4) inches to the center line of a second brick wall; thence turning and running SOUTHERLY by said last described center line Five (5) feet three (3) inches to the center line of a third brick wall; thence turning and running EASTERLY by said last described center line Thirteen (13) feet Two (2) inches to the center line of a fourth brick wall; thence running SOUTHERLY by mid last described center line Thirty-seven (37) feet six (6) inches to the face of another brick wall; thence running WESTERLY by the face of said brick wall Fifty-two (52) feet Ten (10) inches to a point where the SOUTHERLY line of said ell makes an acute angle with the NORTHEASTERLY side of a loading platform, so called; thence running SOUTHEASTERLY to the NORTHEASTERLY corner of said loading platform; thence turning and running SOUTHERLY along the EASTERLY side (exterior) of said loading platform so that the entire platform is outside the above described

premises; thence running SOUTHERLY from the extreme SOUTHEASTERLY corner of said loading platform to a point Twenty-five (25) feet NORTHERLY from the NORTHERLY side of the contemplated extension of Denver Street; thence turning and running WESTERLY parallel with the NORTHERLY line of said contemplated Denver Street and Twenty-five (25) feet distant therefrom, One Hundred Thirty (130) feet to the EASTERLY side of said Stevens Street for a corner; thence turning and running SOUTHERLY by said Stevens Street Twenty-five (25) feet to the NORTHERLY side of said Denver Street for a corner; thence turning and running EASTERLY by said Denver Street Three Hundred Fifty-one (351) feet to the SOUTHWESTERLY corner of land now or formerly of Fall River Industries, Inc.; thence turning and running NORTHERLY by last named land Four Hundred Fourteen and 65/100 (414.65) feet for a corner; thence making an interior angle of 90° 30' and running WESTERLY by land now or formerly of C & L Realty Corp. Seventy-eight and 26/100 (78.26) feet for a corner; thence making an exterior angle of 90° 30' and running NORTHERLY by said last named land Fifty-eight (58) feet for a corner; thence making a right angle and running EASTERLY Eleven and 90/100 (11.90) feet to a point on the ground just outside the perpendicular line extending down from the eaves of the roof of the boiler house, so called, for a corner; thence making a right angle and running NORTHERLY Fifty and 76/100 (50.76) feet to the center line of a Twenty (20) inch brick wall for a corner; thence making a right angle and running EASTERLY by the center line of said wall Fourteen and 18/100 (14.18) feet to the center line of another Twenty (20) inch brick wall for a corner; thence turning and running NORTHERLY by the center line of said Twenty (20) inch brick wall Twenty and 43/100 (20.43)

feet to the center line of a third brick wall for a corner; thence turning and running EASTERLY by the center line of said third brick wall Thirteen and 20/100 (13.20) feet to a point where said center line joins the outer circumference of a brick chimney or stack, Five (5) feet thick, for a corner; thence turning and proceeding into said chimney in a SOUTHERLY direction Two and 5/10 (2.5) feet to the center line thereof for a corner; thence turning and proceeding in a general SOUTHEASTERLY direction by the center line of said chimney wall in an arc parallel with the outer circumference and Two and 50/100 (2.50) feet distant therefrom for a distance of Twelve and 11/100 (12.11) feet for a corner; thence turning and running EASTERLY through the outer half of said chimney and continuing in a line on the ground delineated by the center line of a Twelve (12) inch brick wall on the second floor of the building at that point, said line on the ground being directly under the center line of said second story wall, and then through another brick wall to land now or formerly of Fall River Industries, Inc., the distance from the center of the chimney to said land of Fall River Industries, Inc. being Thirty and 29/100 (30.29) feet; thence turning and running NORTHERLY by said last named land Eighty and 29/100 (80.29) feet to a stake at the SOUTHEASTERLY corner of land now or formerly of Stevens Service Co., Inc.; thence turning at right angles and running WESTERLY by said last named land Seventy-eight and 52/100 (78.52) feet to a drill hole for a corner; thence turning at right angles and running NORTHERLY by said last named land Forty-nine and 45/100 (49.45) feet to a stake for a corner; thence turning at right angles and running EASTERLY by said last named land Eight and 52/100 (8.52) feet to land now or formerly of Fall River Industries, Inc.; thence running NORTHERLY by said last named land One Hundred Ninety-five

(195) feet to the SOUTHEASTERLY corner of land now or formerly of Fairhope Fabrics, Inc. for a corner; thence running WESTERLY by said last named land Two Hundred Fifty-five (255) feet to Stevens Street and the point of beginning; containing One Hundred Fifty-seven Thousand Five Hundred Fourteen (157,514) square feet of land, more or less; being the same premises conveyed to Lila H. Ansin by Jefferson Realty Corp. by deed dated August 15, 1970, and recorded in Fall River District Registry of Deeds, Book 986, Page 6. Meaning and intending hereby to convey all the real estate and all rights and interests in real estate now owned by Lila H. Ansin situated on the EASTERLY side of said Stevens Street, SOUTHERLY from the contemplated extension of said Brayton Avenue in said Fall River, howsoever the same may be bounded and described.

Together with all buildings and structures now upon the above-described premises and all fixtures, engines, boilers, transformers, wires, conduits, piping and other equipment belonging to the grantor, used in connection therewith or with any portion of said premises and now situated therein or thereon.

Together with the right, as appurtenant thereto, to keep and maintain all water pipes, hydrant pipes, and sewer pipes as at present located and connected and the right to enter in and upon the adjoining premises wherever said pipes may be located for the purpose of maintaining or replacing said pipes.

Together with the right and privilege, as appurtenant thereto, of having all existing light wires, conduits, transformers, and electrical appliances, hydrants and hydrant lines, gas pipes, and other appliances now used for the benefit of the buildings and structures on said granted premises maintained and continued in their present posi-

tion and the right to enter in and upon the premises where the same are located, for the purpose of maintaining, repairing, improving, and replacing such electric light wires, conduits, transformers, and electrical appliances, hydrants, hydrant lines, pipes, and other appliances as may be necessary.

Together with a right of passage on foot and vehicle, in common with the grantor, its successors and assigns, and others entitled thereto, to and from said Stevens Street over passageway "A" as shown on "Plan of Land situated in Fall River, Massachusetts, belonging to Stevens Manufacturing Co., dated January 22, 1934, F. S. Borden, C. E., with addition thereon made October 5, 1936 and October 5, 1956," which plan is recorded in Fall River District Registry of Deeds, Plan Book 19, Page 42.

Together with all the right, title, and interest of the grantor, if any, in and to as much of Stevens Street and Denver Street as adjoining the granted premises.

This conveyance is made subject to, and with the benefit of, all obligations, rights, duties, reservations, and easements contained in the deeds of the property surrounding the granted premises previously given by Rost Realty Co. and its predecessors in title to other parties and also subject to, and with the benefit of, the party wall reservation, easements and covenants contained in the deed from Rost Realty Co. to C & L Realty Corp. dated December 10, 1946 and recorded in Fall River District Registry of Deeds, Book 483, Pages 233-5 and in the deed from Rost Realty Co. to Thomas French & Sons, Ltd. dated December 23, 1947, recorded in said Registry, Book 495, Page 19.

PARCEL 4: Those parcels of land located on the southeasterly side of Stevens Street, in said Fall River be-

ing known and designated as Lots #73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 87 and 88 on Fall River Assessors Plat E-23 and further bounded and described as follows:

Beginning at the northwesterly corner of the land to be conveyed and at the southeasterly corner of Stevens and Denver Streets; thence running in a easterly direction Four Hundred Fifty-two (452) feet to the southwesterly corner of Omaha and Denver Streets; thence turning and running southwesterly Two Hundred Twenty (220) feet to the northerly line of Detroit Street; thence turning and running in a westerly direction along said northerly line of Detroit Street One Hundred Sixty-Five (165) feet to Lot #84 on Fall River Assessors' Plat E-23; thence turning and running northeasterly along said Lot #84 One Hundred Ten (110) feet; thence turning and running in a westerly direction One Hundred Sixty-Five (165) feet; thence turning and running southwesterly One Hundred Ten (110) feet to the northerly line of Detroit Street; thence turning and running again in a westerly direction One Hundred Twenty-two (122) feet to the southeasterly corner of Detroit and Stevens Streets; thence turning and running northeasterly Two Hundred Twenty (220) feet to the point of beginning.

Rec'd Sep. 17, 1982 at 1:58 PM And Recorded.

A true copy of instrument as recorded in Bristol County Fall River District Registry Of Deeds in Book 1406 Pages 12-16 Inc.

Attest:

Joseph E. Garnfy, Jr.
Register

GC Ex. #7

All Goods Purchased Subject To Terms
in Catalog And As Announced

BEACON LIQUIDATORS & APPRAISERS
9 Melcher Street—4th Floor
Boston, Mass. 02210
Phone (617) 891-9033

Resale 10-14-82

Fall River Dyeing & Finishing Corp.
160 Stevens Street
Fall River, Mass. 02721 676-8235

Lots 1-32 38,440 Yds. Greige Goods	15		5,766.00
Lots 116-176 Dyes & Chemicals			7,500.00
177 12 Gallons Asstd. Colors paint	1	—	12.00
182 341 #2 plain 46½x22x24 (3 skids) cartons		90	306.90
			13,584.90

Paid by Ck. #123
DC

38,440	Purchase—Greige Gds.	5,766.00
	Tubes & Ctns	306.90
	R & P—Plant General	12.00
	Dyestuff	4,556.00
	Dye Chemicals	202.00
	Prep. Chemicals	1,242.00
	Fin. Chemicals	1,500.00
		13,584.90

INVENTORY

August, 1982

			Lbs.
Intravat Liq. OC 107 B*	154.25	X6.17	25[1]
Intrasil Red H G	1290.00	12.90	100
Yellow Brown TC PST	91.00	X4.55	20
Intravat Brown HRR Paste B*	55.12	X6.89	8
Sodyevat Blue N Paste	6.51	2.17	3
Intravat Golden Orange B*		X	50KC
Intravat Golden Orange B*		X	25KC
Lb. Yellow—F-3R X	455.00	7.10	50
Lesolin Red FB X	455.00	9.10	50
Sodium Silicate X	67.20	10.00	640
Sodium Silicate X	6.30	10.00	60
Sody Red 2B	972.00	2.43	400
Sody Green B	380.00	.95	400
Sody Green 3 BCF	303.00	.74	450

[1]Items 1, 3, 4, 5 and 6 marked out in original

			Lbs.
Sody Orange RDCF	459.50	.91	450
Sody Brown 5RCF	360.00	.50	450
Sody Blue 4GBCF	515.00	1.03	500
Sody Yellow ECF	265.00	.53	500
Sody Brown FCF	325.00	.65	500
Sody Brown WDCF	385.00	.77	500
Sody Blue 8RCF	355.00	.71	500
Carrie ATM	350.00	.70	500
Soda Ash X	87.29	.1247	700
Crocion Orange MX2R X	471.53	9.42	50
Dispersol Blue BG (Sody)	384.56	9.61	40
Dispersol Rubine CB Grains	400.00	5.25	80
Ibacron Red F-B X	500.50	5.10	55
Dispersol Orange B2R Grains	230.00	5.85	60
Ibacron Blue F-R X	497.00	.....	40
Dispersol Yellow BCG Grains	546.00	9.61	60
Prophenyl Brill. Blue 2 BC X	.....	.....	90
Yellow SFA X	.....	.....	80
Red 2 Bl. X	.....	6.25	25
Up Red FGL	122.00	.....	90
Scarlet 4SWN X	.....	.....	40
Red RL X	333.00	.....	60
RO-BRL X	.....	.....	15
IP Violet 3RL X	174.00	.....	15
Red GBA X	105.00	4.20	25
Blue MX2G X	267.00	4.45	60
Red MX5B X	226.00	5.65	40
Yellow MX3RA X	570.00	5.70	100
Pro. Blue MXR X	204.00	10.20	20
Pro. Navy MXCDA X	255.00	3.40	75
Pro. Black MXCWA	190.00	3.90	50
Pro. Yellow MX3G X	236.50	5.90	40
Yellow DW X	361.20	9.03	40

			Lbs.
Ciba. Yellow F-3R X	227.50	9.10	25
Cup. Yellow RC 150%	470.00	9.25	50
Cup. Yellow RL 100%	376.00	9.40	40
Pro. Red MXG X	64.50	12.90	5
Dispersol Navy B-T	98.55	14.55	7
Dispersol Green C-6B	321.00	16.05	20
Levafix Yellow E-G-R	127.44	15.93	8
Levafix Red F-4BA	64.70	12.94	5
Levafix Blue E-FFA	34.10	17.05	2
Cup— Navy Blue RL 200% X	50.00	5.00	10
Levafix Brill. Red E-2B	36.14	12.07	2
Dispersol Red FB	60.64	7.58	8
Turq. 8 C-L	910.10	4.90	190
Orange 4GL X	556.00	5.26	100
Pro. Yellow MX2GA	228.00	.....	40
Bordeaux WLF X	475.20	.....	80
Orange WS X	107.40	5.27	20
Brown 5BR X	680.00	.....	20
Pro. Turq. MXG X	537.00	1.95	60
—(Figures Illegible)—			
Yellow 5GL X	497.00	7.10	70
Dis. Navy AR	201.25	1.61	125
Dis. Black BT 100% Liq.	20.25	4.55	5
Intravat Brown BG Past B*	45.90	X9.18	5
Intravat Olive S Past B*	18.93	X6.31	3
Intravat Olive S Past B*	18.93	X6.31	3
Intravat Gold Orange 3C PA B*	111.50	X11.15	10
Intratex Or.	14.30	1.43	10
Arco Diazo Bl. BH 125%	8.84	4.40	2
Black GX 200%	59.25	2.95	15
Brown BR Paste B*	33.80	X6.16	5
Intravat Blue Paste B*	6.51	X6.17	3
Ciba Olive Pastes B*	63.15	X5.31	10
Cup. Blue 3GL X	224.25	14.95	15

—(Remainder Illegible)—

GC Ex. #8

FALL RIVER DYEING & FINISHING CORP.

List of Employees 04/22/83

Former Sterlingwale	Name	Date of Hire	Job
yes	Carlos Carreiro	09-27-82	Cutter
yes	Jose Oliveira	10-04-82	Cutter
yes	John Espinola	10-19-82	Cutter
yes	Joseph Faria	10-20-82	Cutter
yes	Emanuel Sousa	01-17-83	Cutter
no	Ernesto Simoes	01-10-83	Cutter
no	Manuel Farias	01-24-23	Cutter
no	Luis Carreiro	01-31-83	Cutter
no	Jose Lourenco	01-31-83	Cutter
no	Jose Bettencourt	01-31-83	Cutter
no	Mario Espinola	02-02-83	Cutter
no	Victor Sousa	02-22-83	Cutter
no	Francisco Borges	03-02-83	Cutter
no	Joseph Couto	03-07-83	Cutter
no	Jose Pacheco	03-07-83	Cutter
yes	Afonso Silva	03-07-83	Cutter
yes	Manuel Cabral	03-11-83	Cutter
no	Massias Tavares	03-14-83	Cutter

Former Sterlingwale	Name	Date of Hire	Job
no	Edward Raposo	03-21-83	Cutter
no	Carlos Amaral	03-21-83	Cutter
yes	John DeCosta	03-21-83	Cutter
no	Jose Vicente	03-24-83	Cutter
no	Fernando Cabral	03-30-83	Cutter
no	Valter Sousa	04-04-83	Cutter
no	Edward M. Raposo	04-06-83	Cutter
no	Manuel Abrantes	04-12-83	Cutter
no	Jorge Pavao	04-12-83	Cutter
no	Fernando Castanha	04-12-83	Cutter
no	Robert Hebert	04-15-83	Cutter
no	Alan Dubreuil	04-20-83	Cutter
no	Raymond Dubeis	04-25-83	Cutter
yes	John Aruda	3-21-83	Cutter—part time
no	Henry Laberge	02-28-83	Pickup—Cutting Dept.
yes	Raymond Canuel	03-02-83	Pickup—Cutting Dept.
no	Manuel Madeiros	03-07-83	Pickup—Cutting Dept.
no	Marcellius Lararo	03-11-83	Pickup—Cutting Dept.
no	William Ryan	03-21-83	Pickup—Cutting Dept.
no	Mario Gerrafa	03-24-83	Pickup—Cutting Dept.
yes	John Davis	03-28-83	Pickup—Cutting Dept.
yes	Derwin Peckham	11-22-82	Fixer—Cutting Dept.
yes	Manual Pereira	10-19-82	Warehouse—Cutting Dept.
yes	Walter Pereira	11-03-82	Warehouse—Cutting Dept.
yes	Jeffrey Madeiros	02-28-83	Warehouse—Cutting Dept.

Former Sterlingwale	Name	Date of Hire	Job
yes	Benjamin Silva	01-17-83	Floorman—Cutting Dept.
no	Louis Machado	03-21-83	Floorman—Cutting Dept.
no	Richard Ferreira	03-22-83	Sweeper—Cutting Dept.—part time
yes	Jose Carreiro	10-04-82	Scour Range—Preparation Dept.
yes	Raul Correira	09-20-82	Scour Range—Preparation Dept.
yes	George Sears	09-27-82	Scour Range—Preparation Dept.
no	Carlos Pimental	02-08-83	Scour Range—Preparation Dept.
no	Jesuvino Melo	11-15-82	DeSize pad—Preparation Dept.
no	Emanuel Floriano	02-16-83	DeSize pad—Preparation Dept.
no	Octavio Sousa	12-06-82	Dry Cane—Preparation Dept.
no	Carlos Pereira	03-11-83	Dry Cans—Preparation Dept.
yes	Edward Freitas	11-15-82	Dry Cans—Preparation Dept.
yes	Marc Jean	03-17-83	Dry Cans—Preparation Dept.
yes	Manuel Marques	11-23-82	Floorman—Preparation Dept.
no	Rogerio Borges	03-10-83	Floorman—Preparation Dept.
no	David Souza	04-18-83	Floorman—Preparation Dept.

Former Sterlingwale	Name	Date of Hire	Job
yes	Hermano Lourenco	09-27-82	Receiving
yes	Norman Rego	09-20-82	Jiggers—Dye Dept.
yes	Domingos Ferreira	10-11-82	Jigger—Dye Dept.
yes	Gil T. Cabral	10-20-82	Jigger—Dye Dept.
yes	Richard Buckley	10-25-82	Jigger—Dye Dept.
yes	Januario Rocha	11-01-82	Jigger—Dye Dept.
yes	Victor Raposa	11-01-82	Jigger—Dye Dept.
no	Antonio Araujo	11-12-82	Jigger—Dye Dept.
no	Jose Tavares	01-17-83	Jigger—Dye Dept.
no	Jose Carvalho	01-24-83	Jigger—Dye Dept.
yes	Hermano Correia	02-14-83	Jigger—Dye Dept.
yes	Antone Albernaz	03-07-83	Jigger-Dye Dept.
yes	David Larrivee	03-08-83	Jigger—Dye Dept.
no	Luis A. Coata	03-14-83	Jigger—Dye Dept.
yes	Anthony Bettencourt	10-04-82	Drugman—Dye Dept.
yes	Kenneth Desrosiers	02-14-83	Drugman—Dye Dept.
no	John Kenyen	03-14-83	Dye Office—Dye Dept.
no	Daciel Couto	11-01-82	Range—Finishing Dept.
yes	Gary Correira	11-22-82	Range—Finishing Dept.
yes	William Freitas	11-26-82	Range—Finishing Dept.
no	David Lourenco	11-26-82	Range—Finishing Dept.
no	Seraphin Cordeiro	01-03-83	Range—Finishing Dept.

Former Sterlingwale	Name	Date of Hire	Job
yes	Humberto DeJesus	03-07-83	Range—Finishing Dept.
no	Thomas Cordeiro	03-08-83	Range—Finishing Dept.
no	William Tanguay	03-08-83	Range—Finishing Dept.
no	Roy Moreira	01-03-83	Range—Finishing Dept.
yes	Francisco Albernaz	10-13-82	Inspector, Tuber.
yes	Simeao Cordeiro	10-19-82	Inspector, Tuber.
yes	Dinarte Farias	10-29-82	Inspector, Tuber.
yes	Jorge Amaral	11-01-82	Inspector, Tuber.
no	Gil Pereira	11-15-82	Inspector, Tuber.
yes	Joseph Machado	12-13-82	Inspector, Tuber.
yes	John Costa	03-02-83	Inspector, Tuber.
yes	Edward Conlon	03-21-83	Inspector, Tuber.
no	William Camara	04-13-83	Inspector, Tuber.
yes	Leo Serba	10-29-82	Order Control—Shipping Dept.
no	Cheryl Platt	03-07-83	Clerk Typist—Shipping Dept.
yes	Loren Cardoza	11-15-82	Shader—Shipping Dept.
yes	Marie Serba	12-20-82	Samples—Shipping Dept.
yes	Dimas Pacheco	11-03-82	Packer, Floorman—Ship. Dept.
yes	Victor Cabral	11-15-82	Packer, Floorman—Ship. Dept.
no	Antonio Sousa	12-06-82	Packer, Floorman—Ship. Dept.

Former Sterlingwale	Name	Date of Hire	Job
yes	Antonio Brito	12-20-82	Packer, Floorman—Ship. Dept.
yes	Dennis Medeiros	03-21-83	Packer, Floorman—Ship. Dept.
no	Alfred Lewis	04-05-83	Packer, Floorman—Ship. Dept.
no	Jose Ferreira	09-27-82	Mechanic—Maintenance Dept.
yes	Edwin DeMedeiros	11-22-82	Mechanic—Maintenance Dept.
yes	William Sears	03-07-83	Mechanic—Maintenance Dept.
no	Robert Lachapalla	10-18-83	Electrician Helper—part time
no	Ronald P. Verville	10-04-82	Security
no	Antone Roies	01-25-83	Security
yes	Frederick Bizier	11-02-82	Security-part time
yes	Joseph Medeiros	01-08-83	Security—part time
yes	John Medeiros	01-08-83	Security—part time
no	Joseph Cabral	01-17-83	Lab
yes	Daniel Dupont	11-05-82	Lab
no	Paul Ravenelle	03-14-83	Receiver
yes	Mauricio Machado	11-22-82	Quality Control
yes	Terry Bacon	10-04-82	Controller
yes	Murielle Pellerin	09-27-82	Sales Coordinator

Former Sterlingwale	Name	Date of Hire	Job
yes	Geraldine Bernard	09-20-82	Receptionist—Gen. Office
yes	Kathleen Mayo	11-29-82	Production Scheduler
yes	Veronica Humphreys	12-06-82	Billing Clerk
no	Linda Paul	03-21-83	Gen. Office
yes	Robert Ferreira	09-20-82	Supervisor—Cutting Dept.
yes	Manuel Rego	09-27-82	Supervisor—Cutting Dept.
yes	Everett Rego	09-20-82	Supervisor—Preparation Dept.
yes	Keith Kenyon	09-20-82	Supervisor—Dye Dept.
no	Keith Kenyon Jr.	11-15-82	Supervisor—Dye Dept.
yes	Eduardo DaCosta	11-29-82	Supervisor—Finishing Dept.
yes	Adolph Botelho	10-19-82	Supervisor—Finishing Dept.
yes	Francisco Cabral	09-20-82	Supervisor—Shipping Dept.
yes	Donald Eckersley	09-20-82	Shipper
yes	Jose Sousa	09-20-82	Supervisor—Maintenance
no	Cheryl Platt	03-07-82	Clerk—Typist (shipping)

Fall River Dyeing & Finishing Corp.

Employees hired—No Longer Employed as of 4/22/83

Former Sterlingwale	Name	Date Hired	Date Left	Reason	Job
no	Mario Alves	03-30-83	04-11-83	Quit	Cutter

no	Mario Camara	03-28-83	04-13-83	Quit	Cutter
no	Manuel Correiro	01-10-83	01-17-83	Quit	Cutter
no	Carlos Pereira	03-23-83	03-24-83	Quit	Cutter
no	Edward D. Raposa	04-06-83	04-08-83	Quit	Cutter
yes	Manuel Raposo	02-22-83	03-26-83	Quit	Cutter
no	João Sousa	03-03-83	03-04-83	Quit	Cutter
no	Donald Vaillancourt	03-10-83	03-18-83	Discharged	Cutter
no	Jacinto Botelho	03-08-83	03-10-83	Quit	Scour Range, Preparation Dept.
no	Manuel Ferreira	03-03-83	03-15-83	Quit	Scour Range, Preparation Dept.
no	Carlos Pereira	03-11-83	03-12-83	Quit	Scour Range, Preparation Dept.
no	Leonel Botelho	01-17-83	02-01-83	Quit	Jigger, Dye Dept.
no	Alberto Carneiro	03-14-83	04-08-83	Quit	Jigger, Dye Dept.
no	Paul Medeiros	01-10-83	01-20-83	Quit	Jigger, Dye Dept.
yes	Carlos Borges	10-04-82	11-13-83	Quit	Range, Finishing Dept.
no	Paul Branco	01-03-83	01-04-83	Quit	Range, Finishing Dept.
no	Gary Ferrand	04-05-83	04-08-83	Discharged	Inspector, Tuber

no David Hebert—10-04-82—12-10-82—Discharged—Electrician Helper

yes Estelle Woodruff—11-22-82—02-18-83—Quit—Gen. Office

yes John Vierra—10-09-82—12-23—Quit—Finishing

GC Ex. #9

Fall River Dyeing & Finishing Corp.

Machinery & Equipment Purchases Oct. 1982—Date

Garden Fabrics	12,000.00
Gemco Electrical Co.	15,000.00
Kenneth C. White	1,226.67
Somerset Sheet Metal	2,267.00
Somerset Sheet Metal	378.00
Organizational Fees	28,183.04
Air Power Of New England	12,145.00
Asisa	22,800.00
	$93,999.71

FALL RIVER DYEING & FINISHING CORP.

Plant and General Office
160 Stevens Street
Fall River, MA 02722
Tel: (617)676-8235
Telex: 951-174

Sales Office
1450 Broadway
New York, NY 10018
Tel: (212)354-0232
Telex: 971-805

January 24, 1983
Garden Fabrics Corp.
450 Seventh Avenue
New York, NY 10001
Attention: Joel Sussman

Dear Joel:

This letter is to confirm our purchase from Garden Febrics Corp. of two cutting machines shipped to Fall River Dyeing & Finishing Corp. from Vel-Cord at agreed price of $18,000.00.

You have agreed to accept a .015¢ per yard reduction on all dyeing and finishing for the next 1,200,000 yards of all goods processed by us for your account beginning with all charges as of January 01, 1983. After the $18,000.00 has been worked off, the two Firsching Cutting Machines will be the sole property of Fall River Dyeing & Finishing Corp.

Please sign the copy of this letter in space noted below and return to us.

Sincerely,

Fall River Dyeing
& Finishing Corp.
Herbert Chace, Vice President

For:
Garden Fabrics Corp.
/s/Joel Sussman

H 42969

Gemco Electrical Co. Inc.

MECHANICAL & ELECTRICAL CONTRACTORS

24 HOUR SERVICE • MOTOR REPAIRING • PANEL BUILDERS

3 Davol Street • Fall River, Mass. 02720 • Tel. 678-3977 — 678-3978

Job Order # 7975 Date October 15, 198

er Dyaing & Finishing Co. Job Identification

avens Street Address

State Ma. 02721 Customer P.O. No.

☐ Day Work ☐ Sale ☐ Terms: Net 30 days. As in accordance with our terms, a finance charge computed by a periodic rate of 1½% per month, which corresponds to an Annual Percentage Rate of 18% per year will be imposed on all account balances which remain unpaid at the end of 30 days.

	0·00 *	
	10,000·00 *	
	5,000·00 *	
	15,000·00 ◊	
Inv. 235	500·00-	
	14,500·00 ◊	
pd 11/10/82 ck #180	1,000·00-	
	13,500·00 ◊	
pd 11/19/82 ck #204	2,000·00-	
	11,500·00 ◊	
pd 12/02/82 ck # 249	2,000·00-	
	9,500·00 *	
12/09 ck 282	3,000.00-	
	6,500.00	
1/4/83 ck 343	3000.00-	
	3506.00	
	(3500.00)	

QTY USED	MATERIALS	UNIT PRICE	AMOUNT
	Disconnect equipment from metal building and re-connect at main building.		
	PROGRESSIVE BILLING.....	.....	10.000 00

RE & D. Sept - Oct,

EXTENSION CHECKED

APPROVED

ACCOUNT M + E

FUEL BK. NO. P +

DATE NO. | CHECK NO.

P.A.D IN FULL 2-4-83

Ck # 453

JOURNEYMAN	MI.	HELPER	MI.	RATE	HOURS	O.T.	DT.	TOTAL

MATERIALS

TAX

MILEAGE

305

Ejenco Electrical Co. Inc.

MECHANICAL & ELECTRICAL CONTRACTORS

24 HOUR SERVICE • MOTOR REPAIRING • PANEL BUILDERS

753 Davol Street • Fall River, Mass. 02720 • Tel. 678-3977 — 678-3978

Job Order # 7975 Date Nov. 19, 1982

Customer's Name Fall River Dyeing & Finishing Co. Job Identification

Address 160 Stevens St. P.O. Box 2548 Address

City Fall River State Mass. 02722 Customer P.O. No.

Service Call ☐ Contract Job ☐ Day Work ☐ Sale ☐ Terms: Net 30 days. As an accommodation with our terms, a finance charge computed by a periodic rate of 1½% per month, which corresponds to an Annual Percentage Rate of 18%, per year will be imposed on all unpaid balances which remain unpaid at the end of 30 days.

Description of Work:

QUANT. ORDERED	QUANT. RETURNED	QUANTITY USED	MATERIALS	UNIT PRICE	AMOUNT
			Disconnect equipment from metal building and re-connect at main building.		
			BALANCE OF CONTRACT.....		[illegible]

ENGR. Bal of Contract

EXTENSION ENGINEER T

APPROVED

ACCOUNT M+E

PURCH. ORD. P.O.

DATE PD. | CHECK NO.

JOURNEYMAN	MI.	HELPER	MI.	RATE	HOURS	O.T.	DT.	TOTAL

MATERIALS

TAX

MILEAGE

LABOR

TOTAL

I hereby acknowledge the satisfactory completion of the above described work.

Signature

RETURN COPY

306

BEST AVAILABLE COPY

100 — Due 10/27/82
100 — " 11-29-82
143.20 " 12-22-82

KENNETH C. WHITE
Plumbing & Heating
1047 Gardners Neck Road
SWANSEA, MASSACHUSETTS 0277

Phone 678-5439

Oct. 21/82

TO Stanley White
Stevens Abby
Fall River

0.00 *
CT
3,343.20+ 70 10/1
Pd 10/27/82 1,100.00- / 10/15
Ck# 148
2,243.20 * 2 10/18
Pd 11/30/82 (1100.00) 0
Ck# 241
1,243.20
Pd 12/22/82
Ck #349

Plumbing in gymnasium
Leaks on steam lines 1st & 2nd floor sprinkler
& installation of new lines

3343.20
Total Cost ~~$3363.00~~

RE: Q 9/20 - 10/18/82
EXTENSION CHECKED T.B.
APPROVED
ACCOUNT LEASEHOLD Improvements 2116.53
Machinery & Equip 1226.67
PUR. BK. NO. P.2
DATE PD. | CHECK NO.

SIGNED Ken White

☐ PLEASE REPLY ☐ NO REPLY NECESSARY

HELPERS

TOTAL $3,92
SIGNED
$ 571.92
$ 54,92

307

BEST AVAILABLE COPY

MATERIAL and LABOR RECORD

JOB NAME: Sterling W. Lib — DATE: 9/30/82

JOB LOCATION: Dyke Precinct — 10/13/82

QTY.	DESCRIPTION OF MATERIAL	PRICE	AMOUNT
2	1/2" Sch 80 Pvc Union	8.80	17.60
2	1/2" Brass x Stainless	21.30	42 60
2	1/2 x CL. Sch. 80 NIPPS	1.10	2 20
2	1/2 x 1 1/2 " "	1.10	2 20
2	1/2 x 2 " "	1.10	2 20
2	1/2 x 3 " "	1.16	2 32
2	1/2 x 4 " "	1.21	2 42
2	1/2 x 5 " "	1.45	2 90
2	1/2 x 6 " "	1.49	2 98
12	1" Blk nipples	1.54	18 48
2	Valve Teflon	3	6 00
1	Con Pipe Dope		3 50
			$105.46
		Tx	5.27
			$110.67
10/15	2 men	3	108 00
10/18	2 men	8	288 00
10/18	2 men	8	288.00

LABOR RECORD	HOURS	RATE	AMOUNT
MECHANICS			
9/30 2 men	8		288 00
10/1/82 1 man	8		144.00
HELPERS			
			$1226.67
SIGNED		TOTAL	

FORM 238 Available from Rolfes Inc., Groton, Mass. 01450

Somerset Sheet Metal, Inc.
Air Conditioning - Heating - Ventilation
1490 G.A.R. Highway, Somerset, Mass. 02726

Oct. 29, 1982

Fall River Dye & Finishing
160 Stevens Street
Fall River Mass

10/15 Remove stainless duct work from green building and erect frame over cans

10/20 Remove (2) fans on green building roof and cap holes

10/25 Fabricate new curb for fan and galv flashings

10/26 Assemble fan cut hole in roof install curb

10/27 Install stainless steel duct work

10/28 Install Stainless steel on hood and seal roof

Labor and material $2267.00

Telephone (617) 678-9397

Somerset Sheet Metal, Inc.
Air Conditioning - Heating - Ventilation
1490 G.A.R. Highway, Somerset, Mass. 02726

Nov. 10, 1982

Fall River Dye & Finishing
160 Stevens Street
Fall River Mass

Fabricate and install safety guards on brush machine cutting room

Labor and material $ 378.00

Air Power of New England
316 Codman Hill Rd.—Boxboro, MA 01719
(617)264-4000 (603) 622-2419 (401) 274-7356 (203) 721-0010

INVOICE NO. 4991

3/31/83

To Fall River Dyeing & Finishing
160 Stevens St.
Fall River, MA 02722

Herb Chase, 3/31/83, Factory-Direct, Factory, Special

Qty. Ordered	Qty. Shipped	Description	Unit	Total Price
1	1	GA 709 Pack Atlas Copco used 75 HP 460 volt compressor S/N 757-520 1 year warranty	12,145.00	12,145.00
1	1	Filing fee	10.00	10.00
		3/28/83 paid ck #700	(6,000.00)	(6,000.00)
		Balance due		6,155.00

Payable as follows:
5/1/83 $1500.00
6/1/83 $1500.00
7/1/83 $1500.00
8/1/83 $1655.00

Purchase Order

Fall River Dyeing & Finishing Corp.
160 Stevens Street - Fall River, Massachusetts 02722
(617) 676-8235

To

Asisa, Apartado 98, Sabadell (Barcelona) Spain

Ship to

Fall River Dyeing & Finishing Corp., 160 Stevens St., Fall River, MA 02722, U.S.A.

4/14/83 ship 6/01/83 C.I.F. Boston or N.Y. As Stated Below

One	ASISA (Mini-Jig) 800 mm (31'') Batching Diameter 1300 mm (72'') Rollers width, including standard covers	$21,880.00
	Extras: Automatic Temp. Controls	720.00
	Inside Light	200.00
	Freight & Insurance to Boston or N.Y. absorbed by ASISA	—0—
	Payment Terms 10% with order 5% at at shipment 85% balance 3 years @11% interest on unpaid balance (by bank guarantee)	
	TOTAL:	$22,800.00

———

SCHEDULE B

SUPPLEMENTARY LETTER TO AGREEMENT DATED AS OF APRIL 1, 1978

1. The COMPANY and the UNION recognize that COMPANY work rules and past practices include the following:

   That, on any continuous or wet machine operation, the employee shall work his full shift, and shall be allowed up to fifteen (15) minutes after the end of the shift, for wash-up time, which shall be paid for by the COMPANY. ''Continuous'' or ''Wet Machine'' operations, as herein used, are hereby defined to include Jiggers, Preparation Range, Dry Cans, Pad, Finishing Range, and Hoist Man. No additions shall be made to this list without the consent first obtained of the UNION. The department supervisor is responsible for insuring that the ''continuous'' or ''Wet machine'' operations are covered by the necessary operators at all times. If a case arises where an operator does not show up for his scheduled work hours on time and relief for the operator, whose shift is terminating, has not yet been implemented, the responsible department supervisor must be notified forthwith, and all efforts to prevent damage to any machine and any fabric involved must be employed by the operator on duty and the department supervisor. Relief for operators involved must be supplied by the COMPANY as soon as possible and any operator who works beyond his scheduled working hours will be paid by the COMPANY.

2. The COMPANY agrees that, on or before May 4, 1978, it will pay the first week of vacation pay for the first year of the Agreement to those employees entitled to 40 hours or more of vacation pay.

/s/ Leonard M. Ansin
For the COMPANY

/s/ Anthony (Illegible)
For the UNION

———

GC Ex. #10

Fall River Dyeing & Finishing Corp.
Sales Factured Thru Bankers Trust Co.

Oct. 1982-March 1982

	Sales To Date
	$
Acadia Co., Inc., 1250 Broadway, N.Y., N.Y. 10018	10,580
Asco International, 229 West 36th St., N.Y., N.Y. 10018	224,351
Brave Sales Corp., 420 So. 5th St., Harrison, N.J. 07029	5,803
Brookhaven Textiles Inc., 1412 Broadway N.Y., N.Y. 10018	21,012
Capri Textile Processors, 168 Stevens St., Fall River, MA.	1,443
Centennial Textiles Inc., 1384 Broadway, N.Y., N.Y. 10018	14,766
Confetti, Inc., 118 Madison Ave., N.Y., N.Y. 10016	11,758
C. R. Daniels, Inc., 3451 Ellicott Center Dr., Ellicott City, MD. 21043	14,572
Degan Fabrics Corp., 48 West 37th St., N.Y., N.Y. 10018	4,555
Diversitax, Inc., 35 Smull Ave., Caldwell, N.J. 02006	3,417
Eastbank Trading Co., 90 Fifth St., Macon, Ga. 31208	555
Elbe Products, Inc., 30 Hub Drive, Melville, N.Y. 11747	12,326
Ess-Pee Textiles Inc., 37 West 39th St., N.Y., N.Y.	454
Frankel Associates Inc., 1122 Broadway, N.Y., N.Y. 10010	4,085
W. Gamby & Co., 1001 Ave of the Americas, N.Y., N.Y. 10018	55,404

Garden Fabrics Corp., 450 7th Ave., N.Y., N.Y. 10001	417,093
Gilman Textiles, 19 West 34th St., N.Y., N.Y. 10001	552
Isfel Co. (for Sizzle Fabrics), 112 34th St., N.Y., N.Y.	59,468
Arthur Kahn Co., Inc., 35 West 35th St., N.Y., N.Y. 10001	21,402
Kaplan Products Inc., 29 West 35th St., N.Y., N.Y. 10001	12,855
Lane Fabrics Corp., 105 Beach St., Boston, MA. 02111	10,328
Liberty Textile, 78 Spruce St., Paterson, N.J. 07509	10,643
Magicord Corp., 154 West Forest St., Englewood, N.J. 07631	6,893
Majestic Mills, Inc., 1450 Broadway, N.Y., N.Y. 10018	395,494
Marcamy Sales Corp., 1450 Broadway, N.Y., N.Y. 10018	321,146
Piermont Fabrics, 295 Fifth Ave., N.Y., N.Y. 10016	780
Silverman Products & Textiles Inc., 29 West 35th St., N.Y.	12,932
Spartan Mills, Spartanburg, S.C. 29304	206
Spencer Laminating Corp., 3275 Victory Blvd. Staten Island, N.Y. 10314	13,391
S. Starensier Inc., 5 Perkins Way, Newburyport, MA. 01950	1,870
J. P. Stevens & Co., Inc., P.O. Box 828, Greer, S.C. 29602	37,961
Stone Textiles, 1450 Broadway, N.Y., N.Y. 10018	4,704
Textile Buff & Wheel Co., 511 Medford St., Charlestown, MA. 02129	2,605

Tilbury Fabrics, 267 Fifth Ave., N.Y., N.Y. 10016	5,445
TNS Mills Inc., P.O. Box 208, Blackburg, S.C. 29702	84
Townley Mfg., 21 West 38th St., N.Y., N.Y. 10018	33,907
Wala Fabrics, 450 7th Ave., N.Y., N.Y. 10023	22,072
Wasserstein Bros. Inc., 115 West 18th St., N.Y. 10011	6,300
West Point Pepperell, Inc., P.O. Box 69, West Point, Ga.	1,694
John Wolf Decorative Fabrics, 261 5th Ave., N.Y. 10016	1,282
	1,786,188

GC Ex. #11

AGREEMENT BETWEEN STERLING PILE FABRICS CORP. OF R. I. A UNITED TEXTILE WORKERS OF AMERICA, & LOCAL #292

DATED AS OF APRIL 1, 1978

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AGREEMENT

This AGREEMENT made as of the First day of April, 1978, by and between STERLING PILE FABRICS CORP. of R. I., Fall River, Massachusetts, its successors or assigns, (hereinafter called the "COMPANY"), and the UNITED TEXTILE WORKERS OF AMERICA, with principal offices in the City of Lawrence, Massachusetts, and its Local Union No. 292, AFL-CIO (hereinafter called the "UNION").

WITNESSETH:—

The intent and purpose of this Agreement is to foster and maintain amicable relations, promote harmony, increase efficiency, and create a closer cooperation between the COMPANY and the UNION. The COMPANY and the UNION, therefore, dedicate themselves to the estabment of better understanding and recognition of mutual problems.

ARTICLE I—RECOGNITION

Section 1. The COMPANY shall recognize the UNION as the sole collective bargaining representative for all production and maintenance employees at the COMPANY'S Fall River, Massachusetts plant, including the electrician, electrician's helper, and mechanics, but excluding all executives, office clerical and plant clerical

employees, second hands, guards, professional employees and supervisors, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

ARTICLE II—UNION SHOP AND CHECK-OFF

Section 1. Union Security. (A) All present employees who are members of the UNION shall, as a condition of continued employment, remain members in good standing for the duration of this Agreement.

(B) All present employees who are not members of the UNION shall, as a condition of continued employment, become and remain members in good standing for the duration of this Agreement on and after the thirtieth day following the effective date of this Agreement.

(C) All new employees shall be required to join the UNION thirty (30) days from the date of their employment and shall remain members in good standing as a condition of employment during the life of this Agreement.

Section 2. Check-Off of Dues: Upon receipt of the written authorization of any employee covered by this Agreement, the COMPANY shall, during the full term of this Agreement and any extension or renewal thereof, deduct monthly from the wages of each employee who is a member of the UNION, union dues in such amounts as shall be fixed pursuant to the by-laws of the Local and the constitution of the UNION. The total amount so deducted during each month shall, not later than the tenth day of the succeeding month, be remitted to the UNION or its designee, which shall execute and deliver to the COMPANY a proper receipt therefor. The form of such written requests for the deduction of dues shall be sub-

stantially in the form set forth in Exhibit A annexed to this Agreement.

ARTICLE III—HOURS OF EMPLOYMENT AND OVERTIME

Section 1. Regular Work Week. (A) The regular work week shall consist of forty (40) hours, to be worked at the rate of eight (8) hours per day from Monday to Friday, inclusive, and time and one-half shall be paid for any time in excess of eight (8) hours in any one day or forty (40) hours in any one week. When three or more shifts are in operation, the regular work week may end on Saturday at 7 a.m. Nothing in this Article contained shall be deemed or construed as an agreement or guarantee on the part of the COMPANY that it will furnish any amount of work to its employees.

(B) The working hours of each shift shall be as hereinafter set out, and employees shall be at their jobs, ready for work, at the starting hour of their respective shifts:—

(I) *FIRST SHIFT:* The regular working hours of the first shift shall be from 7 a.m. to 3 p.m. on each day from Monday through Friday.

(II) *SECOND SHIFT:* The regular working hours of the second shift shall be from 3 p.m. to 11 p.m. on each day from Monday through Friday.

(III) *THIRD SHIFT:* The regular working hours of the third shift shall be from 11 p.m. to 7 a.m. on each day from Monday through Friday (it being understood and agreed that the said regular working day which starts at 11 p.m. on each such day will end at 7 a.m. on the succeeding day so that the last regular working day of each

week shall end at 7 a.m. on Saturday. In the event that employees shall be required to work in any week starting at midnight on Sunday and ending at 7 a.m. on Monday, the hours so worked shall be paid for at the rate of time and one-half the employee's regular rate of pay.

Section 2. Saturday Work: Work performed on Saturday after 7 a.m. shall be paid for at the rate of time and one-half the employee's regular rate of pay. Employees who take time off during the week for personal convenience shall not receive time and one-half for Saturday work. An employee who has been on short time during the work week or who has been ill during the work week whose illness has been certified by a doctor, shall receive time and one-half for Saturday work if he is scheduled to work.

Section 3. Sunday Work: Twice the regular rate of pay shall be paid for all work performed on Sundays. It is expressly understood and agreed that where reference is made herein to "Sunday work", it shall be construed to mean the hours starting at midnight Saturday and ending at 11:59 p.m. on Sunday.

Section 4. Sixth and Seventh Days: (A) If an employee works for six (6) days in a regularly scheduled work week, the hours worked on the sixth day shall be paid at the rate of time and one-half.

(B) If an employee works for seven (7) days in a regularly scheduled work week, the hours worked on the seventh day shall be paid for at the rate of double time, provided said seventh day falls on a Sunday.

Section 5. Distribution of Overtime: All overtime work shall be distributed as equally and impartially, with preference to seniority, as is possible, to the regular employees of each department who are qualified to do the work; provided, however, that the COMPANY shall have the right, with respect to maintenance work, to select and assign men capable of performing such work other than regular maintenance department workers if, in the sole discretion of the COMPANY, additional workers are required for maintenance deportment work and no additional regular maintenance department workers are available.

Section 6. A maintenance employee called in by the COMPANY outside his scheduled hours, and after he has already left the COMPANY premises, shall receive time and one-half for all hours worked, and in addition shall receive an allowance for idle time at straight time for the difference between four (4) hours and the number of hours actually worked in the aggregate, if less than four (4); provided, however, that this allowance shall not be paid in any case where employees are assigned to work continuous overtime from the end of their regular shift, nor when employees are requested to report for work before their regular reporting time and to continue into their regular shift.

ARTICLE IV—WAGES

Section 1. (A) Effective as of April 1, 1978, April 1, 1979, and April 1, 1980, respectively, the regular rates of pay for all employees shall be those set forth in the respective columns in the Schedule marked "A" attached to this Agreement and made a part hereof. It is expressly

understood that the amounts designated in the three (3) columns on said Schedule "A" shall reflect the rates of pay for the period commencing April 1, 1978, and ending April 1, 1981, payable as therein set forth. The hiring rate of pay for new employees shall not be less than the Federal minimum hourly wage rate. New employees shall receive the regular rate of pay for their job classification after completion of their probationary period, which shall be sixty (60) days for all employees except cutters, and six (6) months for cutters; provided, however, that if the COMPANY requests an additional one (1) month probationary period in any specific instance for a cutter to attempt to qualify, the UNION shall consent to same; and, conversely, should the COMPANY determine that a new cutter has fully qualified for the job prior to the end of his probationary period, his probationary period shall be deemed completed at that time. New employees may be terminated by the COMPANY during the probationary period without assigning any cause therefor.

(B) (1) If the Revised Consumer Price Index for Urban Wage Earners and Clerical Workers (1967=100), unadjusted, of the U. S. Department of Labor, hereinafter referred to as the "Index", should rise in excess of twelve (12) points in the period from April 1, 1978 to April 1, 1979, then the employees covered by this Agreement shall receive, in addition to their regular rates of pay set out in schedule "A", for all time worked after April 1, 1979 and until April 1, 1980, one (1¢) cent per hour for each one (1) point rise in the Index over, and in excess of, twelve (12) points, but limited to an additional amount of three (3¢) cents per hour.

(2) If the Index should rise in excess of twelve (12) points in the period from April 1, 1979 to April 1, 1980, then the employees covered by this Agreement shall receive, in addition to their regular rates of pay set out in Schedule "A", for all the time worked after April 1, 1980 and until April 1, 1981, one (1¢) cents per hour for each one (1) point rise in the Index over, and in excess of, twelve (12) points, but limited to an additional amount of six (6¢) cents per hour, reduced by the additional amount per hour, if any, paid in the previous year in accordance with the provisions of the preceding paragraph (I).

(3) If the Index should rise in excess of twelve (12) points in the period from April 1, 1980 to April 1, 1981, then the employees covered by this Agreement shall receive, in addition to their regular rates of pay, for all time worked after April 1, 1981 and until April 1, 1982, one (1¢) cent per hour for each one (1) point rise in the Index over, and in excess of, twelve (12) points, but limited to an additional amount of three (3¢) cents per hour.

Section 2. Employees who are called upon to work temporarily during slack periods, or who, by reason of the failure of a regular employee to report for work seasonably, are transferred to work, at a job other than their own, shall be paid at the rate of the job to which they are transferred if they agree to work at that rate. If an employee is transferred temporarily and for a short period to a job other than his own, for the convenience of the COMPANY, he shall be paid at the rate applicable to the job to which he is transferred or the rate applicable to his own classification, whichever rate is higher.

Section 3. (A) Any employee reporting for work, or permitted to come to work, on a regularly scheduled work day, without having been notified that there will be no work, shall be given at least four (4) hours work, or if no work is available, four (4) hours' pay, except when lack of work is due to conditions beyond the control of the COMPANY.

(B) Any employee reporting for work on a regular working day (not a day for which overtime is paid), who works at least five (5) hours during such day, and is then sent home by the COMPANY, shall be entitled to be paid at the regular rate for that number of hours that would normally constitute his or her regular working day, but shall be limited to that number of hours during which such person actually works on such a working day, only when lack of work is due to conditions beyond the control of the COMPANY.

(C) Employees will be notified two and one-half (2½) hours before their shifts if there is no work for them if it is reasonably within the power of the COMPANY to do so.

(D) THE COMPANY reserves the right to require said employees to perform any work available in their respective departments for the period for which they are being paid. The limitation concerning "work available in their respective departments" shall not apply with respect to the number of bales. Any employee who refuses to work in accordance with the provisions of this paragraph shall not be entitled to pay as herein provided.

Section 1. Holidays: (A) One and one-half times no differential in wages between men and women performing the same work.

ARTICLE V—HOLIDAYS

Section 1 Holidays: (A) One and one-half times the regular rates of pay shall be paid for all work performed on the following holidays: New Year's Day, Washington's Birthday, Patriot's Day, Memorial Day, Fourth of July, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. If any of the above-mentioned holidays shall fall on a Sunday. the succeeding Monday shall be deemed the holiday.

(B) When work is to be scheduled for a holiday, the COMPANY shall inforc the employees forty-eight (48) hours in advance thereof, if it is reasonably within the power of the COMPANY to do so.

Section 2. Provisions Against Pyramiding: There in the employ of the COMPANY (and have worked for the

(C) To be entitled to pay for a particular holiday, an shall be no duplication or pyramiding of overtime or premium rates of pay, and where particular work falls within two or more overtime or premium classifications, only the highest applicable single overtime or premium rate shall be paid.

Section 3. Paid Holidays: (A) New Year's Day, Washington's Birthday, Patriot's Day (beginning in 1979), Memorial Day, July 4th, Labor Day, Columbus Day, Veterans' Day. Thanksgiving Day, and Christmas Day shall be paid holidays, even though they fall on an unscheduled work day. If any of the above mentioned holidays shall fall on a Sunday, the succeeding Monday shall be deemed the holiday.

(B) To be entitled to pay for a particular holiday, an employee in all cases must have completed thirty (30) days in the employ of the COMPANY (and have worked for the COMPANY within the thirty (30) days immediately preceding the holiday.

(C) To be entitled to pay for a particular holiday, an employee in all cases must have worked his full shift on both the working day before and the working day after the holiday, unless he is prevented for reasonable causes, including Union business, from doing so.

(D) Holiday pay shall be eight (8) hours at the employee's average straight-time hourly earnings for the most recent Social Security Quarter as it appears on the COMPANY'S record.

(E) An employee who works on one of these paid holidays shall be paid at the rate of one and one-half times his regular rate for all hours worked, in addition to his holiday pay.

ARTICLE VI—VACATIONS AND VACATION PAY

Section 1. In connection with the computation of the number of years of employment as intended under this Article VI, a year of employment shall mean twelve (12) calendar months ending on May 31 in any given year. Absence from employment due to industrial accidents, sickness, or lay-offs for lack of work. shall not be deemed to interrupt continuous service.

Each employee in the employ of the COMPANY on June 1 of any contract year shall be entitled to a vacation as specified in Section 6 of this Article, with vacation pay as follows:

(A) Employed 6 months, but less than 1 year—20 hours pay;

Employed 1 year, but less than 2 years—40 hours pay;

Employed 2 years, but less than 3 years—56 hours pay;

Employed 3 years, but less than 4 years—64 hours pay;

Employed 4 years, but less than 5 years—72 hours pay;

Employed 5 years, but less than 11 years—80 hours pay;

Employed 11 years, but less than 12 years—88 hours pay;

Employed 12 years, but less than 13 years—96 hours pay;

Employed 13 years, but less than 14 years—104 hours pay;

Employed 14 years, but less than 15 years—112 hours pay;

Employed 15 years, but less than 16 years—120 hours pay;

Employed 16 years, but less than 17 years—128 hours pay;

Employed 17 years, but less than 18 years—136 hours pay;

Employed 18 years or more—160 hours pay.

(B) Each employee must have worked for the COMPANY an aggregate of at least six (6) months during the twelve (12) calendar months period immediately preceding May 31 in any given year to be eligible for full vacation

pay. An employee who has worked less than an aggregate of six (6) months during said twelve (12) calendar months whether due to industrial accident, illness, lay-off, or other cause shall be entitled only to a fractional portion of his full vacation pay, the numerator of such fraction to be the aggregate number of months he actually worked, and the denominator to be six (6).

(C) For the purposes of the preceding paragraph B of this Section 1. time lost due to industrial accident, illness, lay-off or other cause shall not constitute or be deemed time actually worked.

Section 2. (A) The vacation period for all employees, except maintenance workers, shall be that week of each year in which July 4th shall occur, and the week next following; *provided, however,* that in the first year of this Agreement, the vacation period shall be for one (1) week only, namely, the week in which July 4th shall occur, the week next following to be a regular work week.

(B) The vacation period for maintenance workers may be staggered by the COMPANY. The COMPANY shall have the right to determine the number of maintenance workers who may be on vacation at any time, and shall advise the workers of such determination. The workers shall then ask for their desired vacation periods, and, if more than the determined number request of particular vacation period, workers with greater seniority shall prevail. The vacation schedule shall be established as soon after June 1st of each year as possible, and when established, copies shall be given to the UNION and posted in the maintenance department. Should a maintenance worker be called back to work by the COMPANY after leaving

on or making irrevocable arrangements for, his assigned vacation period, the COMPANY shall arrange for his vacation time to be completed later in the year. Such worker shall receive his full vacation pay for his originally assigned vacation period only, and in addition thereto, he shall be paid time and one-half for the hours actually worked by him during his originally assigned vacation period.

Section 3. Vacation pay shall be paid to each employee (in addition to his or her regular earnings) on the pay day immediately prior to the beginning of the vacation period. Employees on the second and third shifts shall receive their vacation pay by eleven A.M. on the Friday directly preceding a vacation week.

Section 4. If a vacation week shall include a holiday named in Article V, Section 3, such holiday pay shall be added to the vacation pay.

Section 5. If an employee quits, is discharged, or his employment is otherwise terminated prior ot June 1, he will not qualify for, or be entitled to, any vacation pay. Employees who qualify for vacation and/or vacation pay hereunder, but who quit, are discharged, or whose employment is otherwise terminated on or after June 1, shall receive their vacation pay immediately.

Section 6. All employees shall be entitled to two (2) weeks' vacation, (except that, in the first year of this Agreement, they shall be entitled to only one (1) week. However, employees may request permission of the COMPANY to work the second week of the vacation period and shall be permitted to work if work is available and it is feasible to operate the plant.

Section 7. Vacation pay shall be computed at the employee's regular base rate.

ARTICLE VII—SENIORITY

Section 1. (A) The COMPANY agrees to furnish the UNION a seniority list of its employees, by Departments, in the order of their first day of employment.

(B) Seniority shall be established on a Departmental basis at all times. It is agreed that where a case in a Department arises in which a particular skill is involved, the parties will determine the status of the individual with regard to seniority for the purposes of lay-off and recall.

(C) Seniority shall not be affected by temporary lay-offs, industrial accidents, or sickness. Seniority lists shall be posted in each Department.

Section 2. In the event of a lay-off due to lack of work, or in cases of recall, the COMPANY shall, except as modified by the provisions of Section 1 (B) of this Article, apply the rule of seniority within the Departments as follows:

(A) The COMPANY will lay off employees shortest in the time of service. If, as a result of such lay-off, a vacancy occurs in a Department because an employee has been bumped by a more senior employee in that Department, the more senior employee shall fill such vacancy, if he has the necessary skills.

(B) In recall, seniority shall prevail, and the practice shall be that the employee with the longest service record with the COMPANY shall be the first recalled, and so on.

(C) Further, no new help will be hired until all former available regular employees have been returned to work.

(D) New employees shall not be entitled to seniority rating until they have been in the employ of the COMPANY for a period of sixty (60) days.

(E) It is agreed that for lay-off and recall purposes only, local union stewards and officers, not to exceed 13 in all, shall, during their tenure of office, have the highest seniority in their respective Departments, notwithstanding any other provisions contained in this Article, provided they are qualified to do the work.

(F) Employees who are laid off due to lack of work, and who are recalled and return to work within 30 calendar days from the date of such lay-off, shall be entitled to return to the job from which they were laid off if such job is then operating and available, with entitlement to their original job if same becomes available during the succeeding 30 days. Any employee who returns to work after the expiration of the aforementioned 30 calendar days shall be entitled only to whatever job is available at the time of recall.

Section 3. Termination of Employment: An employee's relationship to the COMPANY shall be terminated automatically—

(A) By discharge for cause, subject to the provisions of Article XI, Section 3 and 3-A.

(B) By voluntary quitting.

(C) By failure to return to work at the expiration of a leave of absence.

(D) By failure, during a lay-off because of lack of work, to report for work within three (3) calendar days

after the mailing to his last known address of a notice recalling him, unless, before the expiration of that time, he has arranged for a leave of absence or has notified the COMPANY that he is unable to return to work within the three (3) calendar days due to illness or such other cause.

(E) Employees transferred from one department to another shall suffer loss of required seniority in the last department: except for temporary transfers, and their lay-off becomes necessary in the Department to which an employee has been transferred temporarily, such employee shall be returned to his original Department, and his lay-off shall be determined in accordance with the conditions existing in such Department.

Temporary transfers from one Department to another shall be for a period of no more than 60 days except by mutual agreement.

Section 4. Filling of New Job or Vacancy: Whenever there is a new job or a vacancy in a department, notice of the same shall be posted for three (3) days in such department and on the plant bulletin board. Employees of such department shall have the first right to apply for the job or the vacancy. If the job or vacancy is not filled from within the department, thereafter other employees who, in the judgment of the COMPANY, are properly qualified, shall have the right to apply to fill the vacancy. Where two or more apply for the job or vacancy, if, in the judgment of the COMPANY, ability to do the job is equal, length of service shall be the determining factor. The first six (6) months (or seven months, if an additional month is requested by the COMPANY) for cutters, and the first sixty (60) days for all other employees, shall be considered a trial period during

which an employee, without loss of seniority, may be transferred back to his former job by the COMPANY if he is not satisfactory in the new job or is not content with his new job. No employee may bid to fill a new job or vacancy unless he has been on his current job for at least six (6) months.

Section 5. Promotions to Position of Foreman: Any employee who has the opportunity to become a foreman will be on a trial period for 60 days without loss of his union seniority and advantages. However, if an employee required more than 60 days to qualify for the job, the parties agree to extend the period to three months, after which the employee shall go to the bottom of his Department Seniority.

ARTICLE VIII—LEAVES OF ABSENCE

Section 1. Leaves of Absence, for appropriate periods, shall be granted to employees in cases of illness or injury. Leaves of absence may be granted by the COMPANY for other reasonable cause. Leaves of absence, if granted, shall be for fixed periods of time and may be renewable at the discretion of the COMPANY, with notice to the UNION, but in no case shall a leave of absence exceed twelve (12) months. An employee who has been granted such leave of absence shall be considered as having quit without notice and shall be terminated from employment by the COMPANY if, while on such leave of absence, he engages in other employment, or if he fails to report for work at the beginning of his first regular shift after the termination of such leave. During such leave of absence, an employee shall not be entitled to any pay or to any other rights or benefits under this Agreement except as provided in Article XIII hereinafter, and his sole other right shall be a maintenance of his seniority.

Section 2. Any employee who has completed thirty (30) days of employment with the COMPANY and who suffers a death in his immediate family shall be granted a leave of absence up to and including the day of the funeral, with pay at his regular base rate for his regularly scheduled work days, not exceeding three (3) days, occurring in such leave. The term "immediate family shall be understood to be limited to the mother, father, sister, brother, wife, husband, son, daughter, grandchild, mother-in-law and father-in-law of an employee.

Section 3. Any employee who has completed thirty (30) days of employment with the COMPANY and who is called for jury duty shall be paid by the COMPANY, during such period of service, for his regularly scheduled work days or portions thereof actually lost, the difference between his regular base rate wages actually lost and the amount received by him for his services as a juror.

ARTICLE IX—BULLETIN BOARDS; ACCESS TO PLANT

Section 1. The UNION shall have the privilege of posting, on a special bulletin board in the COMPANY'S plant, official UNION notices regarding UNION business and affairs. Any such notice shall be submitted to the COMPANY before posting.

Section 2. When the UNION representative wishes to visit the COMPANY'S plant, he shall, if possible, make an appointment in advance for such visit. In any event, the representative of the UNION shall, on arrival at the plant,

clear through the regular channels of the COMPANY for receiving visitors, and will be accompanied by a representative of the COMPANY on his visit into the plant.

ARTICLE X—SAFETY AND HEALTH

Section 1. The COMPANY shall continue to make reasonable regulations for the safety and health of its employees during their hours of employment.

Section 2. There shall be a Safety Committee, which shall include an employee, whose time spent at Committee meetings shall be treated as working time. The Committee shall meet the first Tuesday of each month except July, between the hours of 3:00 and 5:00 P. M. All meetings shall be followed up with a written request.

Section 3. All employees shall

(A) comply with such reasonable safety regulations which are now in effect or may later become effective through the efforts of the Safety Committee;

(B) use the protective devices, wearing apparel, and other equipment provided by the COMPANY for the protection of the employees from injury;

(C) do everything reasonably possible to avoid accidents and improve the safety experience of the COMPANY.

Section 4. Failure, after due warning, of an employee to observe COMPANY regulations for the safety and health of its employees, or refusal to use protective devices provided by the COMPANY, shall be sufficient cause for disciplinary action, but the matter shall be taken up with the UNION before discharge.

Section 5. Employees may, and are urged to, make safety suggestions to the COMPANY through the established Safety Committee.

ARTICLE XI—GRIEVANCES AND ARBITRATION

Section 1. Grievance Procedure: In order to establish an orderly procedure for the handling of grievances or disputes hereunder, the UNION shall appoint a steward in each Department, and a chief steward in the plant. All grievances or disputes respecting hours, wages or other conditions of employment shall be dealt with in the following manner:—

(A) Between the Union Steward of the Department in question and the supervisor, Stewards shall not leave their Departments without permission from their supervisors;

(B) Between the chief steward and president of the UNION and the superintendent;

(C) Between the grievance committee, a representative or representative of the International Union, and such representatives of Management, as the COMPANY may designate. The grievance committee of the UNION shall have the right to confer with the responsible representatives of the COMPANY, at reasonable times, and as often as may be necessary, for the purpose of adjusting grievances or disputes. Such conferences shall be held outside of working hours, except at the request of the COMPANY;

(D) The President of the UNION and such other members of the UNION as may be necessary to a proper discussion of the particular grievance shall be permitted to take part under (C) of the foregoing conferences.

Section 2. Arbitration. (A) If the grievance is not adjusted under the steps above provided, and in other cases in

which arbitration is provided for in this Agreement, the matter shall be referred to an arbitrator to be selected by the parties. If the parties cannot agree upon an arbitrator within ten (10) days following a request for arbitration, the arbitrator shall be designated by the Federal Mediation and Conciliation Service, in accordance with its usual practice.

(B) The decision of the arbitrator shall be final and binding upon both the COMPANY and the UNION. One-half of the expense of such arbitration shall be paid by the COMPANY and one-half by the UNION.

(C) The arbitrator shall have jurisdiction and authority only to resolve the questions specifically submitted to him, which shall be limited to interpretation of this Agreement and the application of this Agreement to the matters in dispute which may be presented to him through the grievance procedure. In the event shall the arbitrator be empowered to alter, revise, add to, or abolish, in any way, the provisions of this Agreement.

(D) Notwithstanding any other provision of this Agreement, submission to arbitration of a dispute or controversy shall not be held to be a waiver of the right of the UNION or the COMPANY to contend before the arbitrator that the matter is not arbitrable.

The arbitrator may make such retroactive award or settlement as the equities of the case may demand, but in no event shall any award or settlement be retroactive beyond the date on which the grievance was first presented. The award or decision of the arbitrator, in addition to granting damages and such other relief as the arbitrator may deem proper, may also contain provisions commanding or restraining acts and conduct of the parties.

Section 3. Discharges. In the event any employee shall be discharged by the COMPANY, the COMPANY shall give written notice to the UNION of such discharge and the cause therefor; and if the UNION believes the employee has been unjustly dealt with, such discharge my be considered a case arising under the method of adjustment of grievances herein provided. In the event it should be decided, under the rules of the Agreement, that an injustice has been dealt an employee in regard to a discharge, the COMPANY shall reinstate such employee with such compensation for the time lost as the arbitrator may determine. Written notice to the COMPANY of any grievance with respect to a discharge must be given, and all cases of discharge must be taken up with the COMPANY within five (5) days (exclusive of Saturdays, Sundays, and holidays) from the date of written notice of the discharge, or the discharge shall be final and no longer subject to the grievance procedure.

Section 3. (A) *Just Cause.* The right to discharge employees shall remain in the sole discretion of the COMPANY, except that no discharge shall be made without just cause—just cause to mean, among other things, insubordination or persistent or serious infraction of rules relating to the health or safety of other employees, or of rules reasonably promulgated by the COMPANY and agreed to mutually with the UNION, relating to the actual operation of the plant, or engaging in a strike, sabotage, or failure to abide by the terms of this Agreement or by an arbitration award.

Section 4. Pay for Committee Members: When members of the General Conference Committee are present at contract or wage negotiations, they shall be reimbursed by

the COMPANY for such earnings as they lose by not being at work; but they shall not otherwise be paid for attendance at conferences or meetings.

Section 5. Strikes and Lockouts. (A) It is hereby agreed by the UNION and the COMPANY, parties to this Agreement, that since this Agreement provides for the orderly and amicable adjustment and settlement of any and all disputes, differences and grievances, there shall be no resort to strikes (which includes all stoppages or slowdowns of work) by the employees nor any lockout by the COMPANY of any employee or group of employees. In view of the foregoing, the UNION agrees that it will not authorize any strike, it being understood and agreed, however, that any strike not expressly authorized or ratified in writing by the International President of the UNION (a copy of which shall be sent to the COMPANY; shall be deemed for all purposes an unauthorized strike for which there shall be no liability on the part of the UNION.

(B) In the event of an unauthorized strike, the UNION shall endeavor to secure a return of the strikers to work immediately to the end that the dispute may then be settled peaceably in accordance with the procedures set up herein. Those refusing to return shall be regarded as quitting their jobs or losing their seniority rights.

ARTICLE XII—MANAGEMENT FUNCTIONS

Section 1. Management Functions. Subject to the provisions of this Agreement, the UNION recognizes that the management, control and operation of the COMPANY'S business and plant are exclusively the function of the COMPANY.

Section 2. (A) Nothing in this Article shall prevent the COMPANY, for a trial period of twelve (12) weeks, from introducing new machines or methods. During said twelve (12) week period, the COMPANY may prescribe the work assignments and rates of pay and change the same during said period. Said period of twelve (12) weeks may be extended or reduced by mutual agreement.

(B) Before said work is started, however, the COMPANY shall inform the UNION in detail as to what it intends to do, at least two (2) weeks in advance, and the parties shall negotiate tentative conditions of employment for said twelve (12) week period, which, however, shall be subject to the rights of the COMPANY reserved in the preceding paragraph to make the changes.

(C) It is understood, however, that during said twelve (12) week period, no employee shall be paid less than his average hourly earnings at the time of assignment to this work.

(D) Within fifteen (15) days from the expiration of the trial period, the UNION may present a written statement of any grievance as to the operation under the new conditions, which, if not satisfactorily adjusted by negotiations, shall be submitted to arbitration.

(E) If, as a result of the decision of an arbitrator, the rate of pay on the job in question is increased, the new rate will be retroactive to the beginning of the original trial period.

Section 3. Discrimination. There shall be no discrimination against any officer or member of the UNION, selected to serve the UNION. No employee shall lose seniority rights by reason of absence from the plant on UNION

business for a period agreed upon between the COMPANY and the UNION, provided that prior notice of such intended absence is given to the COMPANY by the UNION.

ARTICLE XIII—INSURANCE

Section 1. The COMPANY shall maintain at its sole expense a group insurance policy providing the following benefits to all employees who have completed six (6) months of employment with the COMPANY:—

(A) Class III, Weekly Income, $80.

(B) Comprehensive Major Medical, lifetime maximum $40,000; 80% of first $2,000, 100% of excess, paid annually.

(C) First $4,000 semi-private hospital in full, 80% thereafter.

(D) $900 Surgical Schedule in full, 80% thereafter.

(E) $500 Supplemental Accident.

(F) Extended care benefit.

(G) (Illegible)

(H) Life Insurance of $3,000.

(I) $10 per doctor's visit in hospital for maximum of 70 visits per confinement.

(J) Diagnostic X-ray and laboratory benefit paying $100 per person per calendar year maximum.

Section 2. All benefits, except weekly accident and sickness benefits, shall be available to employees for a period of thirty-one (31) days following lay-off or during leave of absence, provided that during such period the employee preserves his seniority status, and provided, also, the employee does not engage in employment elsewhere

during such period. If the lay-off or leave *of absence* of such employees continues beyond said period of thirty-one (31) days, the employees shall have the right to maintain the aforesaid benefits for a period of up to six (6) months after expiration of the thirty-one (31) day period, subject to the conditions hereinbefore in this Section provided, and subject to the further condition that such employees shall pay to the COMPANY monthly in advance, on or before the due date therefor, the premium for such group insurance coverage.

Section 3. It is further understood that the COMPANY reserves the right to change insurance company, provided the benefits as stated above remain the same.

Section 4. Effective April 1, 1978, the insurance benefits included in Section 1 above shall be improved by the equivalent of five (5¢) cents per hour; and, effective April 1, 1980, they shall be improved by the equivalent of an additional five (5¢) cents per hour.

ARTICLE XIV—SEVERANCE PAY

Section 1. Any employee who has been employed by the COMPANY five (5) or more years and whose job is terminated as a result of new machinery or other technological changes shall be entitled to receive, upon termination of his employment, severance pay in an amount equal to one week's pay for each year of employment, not to exceed ten (10) weeks pay, at his then regular base rate. It is expressly understood and agreed, however, that the COMPANY shall have the right to employ a displaced employee by placing him elsewhere in the plant so as to avoid the termination of his employment. It is further expressly

understood and agreed that in the event of "job termination" as herein provided, the lowest in seniority in the specific Department shall be the first to be discharged unless it is a case where a particular skill is involved, in which case the parties will determine the status of the individual with regard to seniority. If an employee whose machine or job is gone is not displaced but is continued in employment in the department, he shall have the right to select the machine or job of a more junior employee in the department, if he has the ability to do the job.

ARTICLE XV—RETIREMENT SEPARATION PAY

Section 1. Any employee who, upon reaching the age of sixty-five (65) years, or at any time thereafter, wishes to retire, and has been employed by the COMPANY for five (5) or more years, shall be entitled to receive upon retirement an amount equal to one (1) week's pay for each year of employment, not to exceed fifteen (15) weeks pay, at his then regular base rate. It is expressly understood and agreed, however, that in the case of employees who reach age seventy (70), the COMPANY shall have the right to retire them if the COMPANY so elects, in which event they shall receive the retirement separation pay herein provided if they have been employed by the COMPANY for five (5) or more years.

Section 2. Subject to the provisions of Section 1 above, any employees retiring between the ages of sixty-two and sixty-three shall be entitled to receive eighty-five (85%) per cent of the amount set forth in Section 1, retiring between the ages of sixty-three and sixty-four shall be entitled to receive ninety (90%) per cent of the amount set forth in Section 1, and retiring between the ages of sixty-

four and sixty-five shall be entitled to receive ninety-five (95%) per cent of the amount set forth in Section 1.

Section 3. In connection with the determination of five (5) years of employment as provided in Article XIV and Article XV hereoffi it shall be understood to mean five (5) years consisting of twelve (12) calendar months each, which shall not be affected by temporary layoffs.

ARTICLE XVI—AMENDMENTS TO AGREEMENT

Section 1. As this Agreement sets forth all of the understandings of the parties regarding wages, hours, and conditions of employment, it may not be changed, modified, or added to except by mutual agreement of the parties, which shall be reduced to writing, signed by them, and shall become part of this Agreement. Except as specifically provided in this Agreement, neither party shall be obligated to bargain collectively with regard to any other matters during the term of this agreement.

ARTICLE XVII—DURATION OF AGREEMENT

Section 1. This agreement shall be effective from April 1. 1979, and shall continue in full force and effect until April 1, 1981, and thereafter from year to year unless one of the parties gives at least sixty (60) days' notice in writing to the other terminating the Agreement on April 1, 1981, or on any anniversary date thereafter.

ARTICLE XVIII

Section 1. It is expressly understood and agreed that this writing represents the full agreement of the parties hereto, and is not to be altered, revised, added to, or abol-

ished in any way, by the past action or practices, inaction or waiver, of the UNION and its members or the COMPANY, or by previous oral or written understandings, any and all previous contracts, agreements, writings, stipulation, amendments or understandings or so-called "law of the plant" being herein merged and thereby becoming null and void, except in such cases, if any, as they may be reaffirmed herein.

Section 2. If any provision or the enforcement or the performance of any provision of this Agreement is or shall at any time be contrary to law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If, at any time thereafter, such provision or its enforcement or performance shall no longer conflict with the law, then it shall be deemed restored in full force and effect as if it had never been in conflict with the law. If any provision of this Agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provisions to other persons or circumstances, shall not be affected thereby.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals by their respective proper officers hereunto duly authorized (Illegible)

Signed and sealed
in the presence of:—

/s/ John P. David

STERLING PILE FABRIC CORP.
OF S. I.

By: /s/ Leonard M. Orrin
President
UNITED TEXTILE WORKERS OF
AMERICA
AFL-CIO

By: .....
International President

By: .....
International Vice President
LOCAL UNION NO. 292

By: /s/ Anthony Church
President

By: /s/ Dennis Morris
Vice President

By: /s/ Edward J. McCarthy
Treasurer

By: /s/ Norman Rego
Secretary

By: /s/ Gil T. Cabral
Chief Steward

By: /s/ James Lenehan
International Representative

SCHEDULE A

REGULAR RATE OF PAY

JOB DESCRIPTION	28¢ 4/1/78	30¢ 4/1/79	40¢ 4/1/80
CUTTING			
Utility	$4.31	$5.11	$5.51
Floorman	4.55	4.85	.....
Cutter	4.85	5.135	5.535
Pickup	4.56	4.86	3.85
Brusher & Beamer	4.71	5.01	5.41
Fixer-Cutter	4.935	5.255	5.535
Sweeper	4.31	4.61	5.01
Knife-Maker-Cutter	4.935	5.235	5.635
SHIPPING			
Typist	$4.56	$4.86	$5.26
Enterer & Typist	4.66	4.96	5.36
Feeder Frame Operator	4.78	5.08	5.48
Take-Off Frame Operator	4.61	4.91	5.31
Shader	5.61	5.91	6.31
Tuber	4.57	4.87	5.27
Inspector	4.71	5.01	5.41
Assistant Shipper	4.66	4.96	5.36
Service Man	4.86	5.16	5.56
Packer/Strapper	4.86	5.16	5.56
Floorman	4.56	4.86	5.26
Utility	4.86	5.16	5.56
Seconds	4.76	5.06	5.46
Seconds (A)	4.66	4.96	5.36
Brush Operator	4.56	4.86	5.26
Pre-Inspector	4.71	5.01	5.41
Tuber & Inspector	4.81	5.11	5.51
DYE-HOUSE			
Hoist	$4.84	$5.14	$5.54
Jig	4.76	5.06	5.45

Drug Room	5.16	5.46	5.86
Dye Pad	5.04	5.34	5.74
Polychromatic	5.09	5.39	5.79
PROCESSING			
Receiver's Helper	$4.86	$5.16	$5.56
Preparation Range Feeder Operator	4.96	5.26	5.66
Preparation Range Take-Off Operator	4.96	5.26	5.66
Utility & Truck Driver	5.11	5.41	5.81
Double Stand Dry Can Operator	5.06	5.36	5.76
FINISHING			
Finishing Range Operator	$5.26	$5.56	$5.96
Finishing Range Back Tender	4.71	5.01	5.41
MAINTENANCE			
Mechanic A	$5.38	$5.68	$6.08
Mechanic B	5.18	5.48	5.88
Mechanic C	5.11	5.41	5.81
Utility & Maintenance	4.91	5.21	5.61
Custodial	4.14	4.44	4.84
Electrician A	5.62	5.92	6.32
Electrician B	5.12	5.42	5.82
Electrician C	4.62	4.92	5.32
JOB DESCRIPTION	28¢ 4/1/78	30¢ 4/1/79	40¢ 4/1/80
MAINTENANCE			
Pipe Fitter (A)	$5.62	$5.92	$6.32
Pipe Fitter (B)	5.38	5.68	5.08
Pipe Fitter (C)	4.91	5.21	5.61
Metal Fabricator & Installer	5.62	5.92	6.32

RETAIL			
Utility	4.56	4.86	5.26
Samples	4.93	5.23	5.63
Assistant Samples	4.83	5.13	5.53
Double S Roll	4.81	5.11	5.51

In addition to the above, some jobs have incentive rates.

GC Ex. #12

STERLINGWALE CORPORATION
168 Stevens Street
Fall River, Massachusetts

June 13, 1979

United Textile Workers of America, AFL-CIO
207 Union Street
Providence, RI 02909

ATTN: *MR. JAMES LENEHAN, INTERNATIONAL REPRESENTATIVE*

Dear Mr. Lenehan:

This is to advise you that as of April 1, 1979, Sterling Pile Fabrics Corp. of R.I., a Rhode Island corporation, merged into Sterlingwale Corporation, a Massachusetts corporation, with Sterlingwale Corporation being the surviving corporation in the merger.

As of the date of the merger, all of the estate, property, rights, privileges, powers, franchises and interests of each of the constituent corporations and all of their property, real, personal and mixed, and all debts due on whatever account of either of them became vested in Sterlingwale as the surviving corporation, without further act of deed, so that for your purposes, the Collective Bargaining Agreement between Sterling Pile Fabrics Corp. of R.I. and United Textiles Workers of America and Local No. 292, dated as of April 1, 1978, became, as of that date, the obligation and the right of Sterlingwale Corporation.

Very truly yours,

"STERLINGWALE"
/s/ Jack Davis

JD/db

cc: Mr. Anthony Cabral, President Local 292
United Textile Workers of America

Copy posted on employee's notification bulletin board

GC Ex. #13

FIRST AMENDMENT TO AGREEMENT BETWEEN STERLING PILE FABRICS CORP. OF R.I. AND UNITED TEXTILE WORKERS OF AMERICA & LOCAL #292 DATED APRIL 1, 1978

AGREEMENT MADE this day of October, 1980, by and between STERLINGWALE CORPORATION, successor to Sterling Pile Fabrics Corp. of R.I., (hereinafter referred to as the "COMPANY"), and UNITED TEXTILE WORKERS OF AMERICA and its Local Union No. 292, AFL-CIO, (hereinafter referred to as the "UNION")

W I T N E S S E T H

WHEREAS, the COMPANY and the UNION entered into a Collective Bargaining Agreement dated April 1, 1978, (hereinafter referred to as the "AGREEMENT"); and

WHEREAS, the COMPANY has requested that the UNION agree to an amendment of the AGREEMENT based on the current unfavorable financial situation of the COMPANY;

NOW, THEREFORE, in consideration of One ($1.00) Dollar and other valuable considerations paid each to the other, it is hereby agreed by the COMPANY and UNION as follows:

1. ARTICLE XVII of the AGREEMENT is hereby amended by deleting "1981" in lines 3 and 5 and substituting therefor "1982."

2. The COMPANY and the UNION agree that it is essential that the labor productivity in the plant of the COMPANY be substantially increased to insure the COMPANY's continued existence. The COMPANY and the UNION agree to cooperate to try and increase the labor productivity at the plant of the COMPANY by at least ten (10%) percent. The UNION agrees to participate with representatives of management of the COMPANY in productivity workshops in an attempt to achieve the productivity increases that are being sought.

3. The COMPANY and the UNION agree to commence contract negotiations on October 1, 1981. Both parties will negotiate in good faith and attempt to reach a new labor agreement. The new contract will go into effect as soon as agreement is reached, even if prior to April 1, 1982.

4. In all other respects, the AGREEMENT is hereby ratified and confirmed.

IN WITNESS WHEREOF, thee said parties have hereunto set their hands and seals, by their respective proper officers hereunto duly authorized, as of the day and year first set forth above.

Signed and sealed in the
presence of:

/s/ (Illegible)

STERLINGWALE CORPORATION

By: /s/ (Illegible)
President
UNITED TEXTILE WORKERS OF
AMERICA
AFL-CIO

By: .....
International President

By: .....
International Vice Presidnt
LOCAL UNION NO. 292

By: /s/ Anthony Church
President

By: /s/ Dennis Morris
Vice President

By: /s/ Edward J. McCarthy
Treasurer

By: /s/ Norman Rego
Secretary

By: /s/ Gil T. Cabral
Chief Steward

By: /s/ James Lenehan
International Representative

GC EX. #14

STELINGWALE CORPORATION
168 Stevens Street, Fall River, Mass. 02722 U.S.A.
Telephone (617) 678-4551
Cable Name ANTEX FRIV
Telex. No. 929-434

EFFECTIVE APRIL 1, 1981 ALL BASE RATES WILL BE INCREASED BY 03¢ PER HOUR

DEPARTMENT	NEW BASE RATE
WAREHOUSE AND MAKEUP DEPARTMENT	
BRUSHER	$5.50
BEAMER	5.50
BEAMER/TRIMMER	5.50
BRUSHER/BEAMER	5.50
UTILITY/TRUCK DRIVER	5.90
QUALITY INSPECTOR	5.84
WAREHOUSEMAN	5.35
UTILITY	5.65
BACKSIZE FEEDER	5.57
BACKSIZE DOFFER	5.50
CUTTING DEPARTMENT	
CUTTER	$5.625
PICK-UP	5.35
FIXER/CUTTER	5.90
KNIFE MAKER/CUTTER	5.725
UTILITY	5.60
FLOORMAN	5.35
SWEEPER	5.10

PROCESSING DEPARTMENT	
(SCOUR DEPT.)	
PREPARATION RANGE FEEDER/OPERATOR	$5.75
PREPARATION RANGE TAKE-OFF OPERATOR	5.75
PREPARATION RANGE/UTILITY OPERATOR	5.75
RECEIVER'S HELPER (FORKLIFT)	5.65
DOUBLE STRAND DRY CAN	5.85
PAD REACH OPERATOR	5.83
DYEHOUSE	
HOIST	$5.76
JIG	5.55
PAD HELPER/WASHER	5.63
DYE PAD	5.83
DRUG ROOM	5.95
POLYCHROMATIC	5.88
INSPECTION DEPARTMENT	
INSPECTOR	$5.84
BRUSH OPERATOR	5.35
PRE-INSPECTOR	5.84
INSPECTOR HELPER	5.35
FINISHING DEPARTMENT	
FINISHING RANGE OPERATOR	5.56
FINISHING RANGE FOAM APPLICATOR	6.05

FINISHING RANGE BACK TENDER	5.50
FINISHING RANGE HELPER	5.35

SHIPPING DEPARTMENT

TYPIST	$5.35
ENTERER/TYPIST	5.45
SHADER	6.40
SERVICEMAN	5.65
PACKER/STRAPPER	5.65
FLOORMAN	5.35
UTILITY	5.65
SECONDS	5.65
TUBER/INSPECTOR	$5.60
SAMPLES	5.72
ASSISTANT SAMPLES	5.62
TUBER	5.36

REMNANT DEPARTMENT

UTILITY	$5.35
DOUBLE/ROLL	5.60

MAINTENANCE

MECHANIC A	$6.17
MECHANIC B	5.97
MECHANIC C	5.90
UTILITY/MAINTENANCE	5.70
PIPE FITTER A	6.41
PIPE FITTER B	6.27
PIPE FITTER C	5.70
CUSTODIAL	4.93
ELECTRICIAN A	6.41

ELECTRICIAN B	5.91
ELECTRIAN C	5.41
METAL FABRICATOR/INSTALLER	6.41
CARPENTER	6.07
HELPERS	5.97

DONALD G. BERRY

GC EX. #15

UNITED TEXTILE WORKERS OF AMERICA
AFFILIATED WITH THE AFL-CIO

420 COMMON STREET
LAWRENCE, MASSACHUSETTS 01840

Area Code 617
686-2901

Office of the Vice President

Gregory Reilly
207 Union Ave.
Providence, Rhode Island 02909
Telephone: (401) 944-1930

October 19, 1982

Mr. Herb Chase, Executive Vice President
Fall River Dyeing & Finishing Corp.
160 Stevens Street
Fall River, Massachusetts 02721

Dear Mr. Chase:

This is to notify you that, pursuant to the Agreement between Sterlingwale Corporation and United Textile Workers of America and its Local Union No. 292, the "Union" hereby demands recognition as provided in the "Agreement," page one, first paragraph, line three—"its successors or assigns."

One of our representatives will call on you at your office on Thursday, October 28, 1982, at 1:00 P.M. for the purpose of negotiating a collective bargaining agreement.

If such a date is inconvenient for you, please notify us at our Regional Office, 207 Union Avenue, Providence, Rhode Island 02909 (Telephone: 401-944-1930), so that another more convenient date can be arranged.

In the event of any discrimination against any person because of their union affiliation, or in the event of your refusal to bargain with us, we will take prompt action to remedy such discrimination or refusal to bargain.

Very truly yours,

/s/ James Lenehan
International Representative
United Textile Workers
of America

CC: Francis Schaufenbil
James Clarkin
Anthony Cabral

Certified Mail 1060529

GC Ex. #16

October 21, 1982

James Lenehan
International Representative
United Textile Workers of America
207 Union Avenue
Providence, RI 02909

Re: Fall River Dyeing & Finishing Corp.

Dear. Mr. Lenehan:

This office represents Fall River Dyeing & Finishing Crp. of 160 Stevens Street in Fall River, Massachusetts.

In confirmation of our earlier telephone conversation, my client has referred your letter of October 19, 1982, to me, wherein you demand "recognition" and you request my client to negotiate a collective bargaining agreement with your Union.

Please be advised that my client does not intend to comply with your request; and further, that it is our belief that there is no legal basis for same.

Very truly yours,
James W. Clarkin

JWC:ro
cc: H. Chace

BEST AVAILABLE COPY

STATEMENT - ACCOUNT OF

FALL RIVER [illegible] Co 203

SUBJECT TO TERMS OF FACTORING AGREEMENT WITH

BANKERS TI J ST COMPANY

BT F T

POST OFFICE BOX 1030, ANSON ST

ORS

ATION, NEW YORK

FOR MONTH OF NOVEMBER 82

GC #19 orig

					DAYS	SUB TOTAL	INTEREST	TOTAL
BALANCE FORWARD					30		813.73	69,748.35CR
SALES						145,001.38		
CREDITS						1,239.72-		
DISCOUNTS						.00		
INTEREST ON	143,761.66	AVERAGE DUE DATE	12/26.82		27		1,509.50-	
DR/CR MEMOS	DATE	REF NO	AMOUNT	DAYS				
	11/30/82	1391	35.60-					
	11/30/82	1546	6,125.00-					
	11/30/82	1547	3,791.67-			9,951.67-		
POSTAGE 103 UNITS AT 0.0 CENTS						.00		
COMMISSION					15	1,450.01-	8.46-	
DISBURSEMENTS	DATE	REF NO	AMOUNT	DAYS				
	11/ 1/82	11632	14,000.00-	30				
	11/ 4/82	13548	10,000.00-	27				
	11/ 4/82	48359	114.85-	27				
	11/ 9/82	13761	3,500.00-	22				
	11/ 9/82	17536	22,500.00-	22				
	11/15/82	13862	19,500.00-	16				
	11/17/82	21451	55,000.00-	14				
	11/18/82	48495	21.00-	13				
	11/22/82	25144	31,500.00-	9				
	11/23/82	14004	7,500.00-	8				
	11/24/82	27467	11,000.00-	7				
	11/29/82	31418	6,000.00-	2				
	11/30/82	14095	3,500.00-	1				
	11/30/82	32540	25,000.00-	1		192,135.85-		
*** SUB-TOTAL OF INTEREST AT 14.00000 PERCENT PER ANNUM							974.31-	
TOTAL INTEREST CHARGES							1,678.54-	
						1,678.54-		
							NET CHANGES	61,454.41-
							NEW BALANCE	8,293.94CR
								39,500.00
								47,793.94 CR

November '82

Factoring Charge	1450.01
Postage	21.00
Bank Charge	35.00
Professional Fees	114.85
Interest Expense	1,678.54
A/R E.T. Torture	2,299.40

EXCEPT AS OTHERWISE INDICATED, THIS STATEMENT ONLY COVERS TRANSACTION[S] UND[ER] STATEMENT SHALL BE DEEMED CORRECT AND BINDING ON YOU UNLESS NOTICE O[F] ANY[ ] ABOVE ADDRESS WITHIN THIRTY (30) DAYS OF THE MAILING OF SUCH STATEMENT TO YOU.

IN YOUR FACTORING AGREEMENT WITH BANKERS TRUST COMPANY THIS SPECIFIC EXCEPTIONS IS RECEIVED BY BANKERS TRUST COMPANY AT ITS

ED AT BY CREDITING ALL OF YOUR SALES ALTHOUGH THE SAME MAY BE

RESPONDENT EXHIBIT #1
(Rejected)

We are former Sterlingwale Corp. employees and we do not want to be represented by United Textile Workers of America, Local 292. We wish to be treated fair by the Company with respect to wages and holidays and other matters.

Toni T. Carruie
Ed Freita
Octavio Sousa
Raul Correira
Gil L. Gabral
Victor Reford
Antonio J. Araujo
Lain Rocks
Richard Buckley
Walter N. Perria
Jeffrey Medeiros
Manuel B. Pereira
Illeg.
Gary Conner
C. J. Meleros
Dominges J. Fenuisa
Dennis Mederios
William Sears
Dimos S. Douchseo
Marie Serba
Fran Albeniz
John Costa
Dinarte Faicas
Sineldo C. Cordeiro
Edward Corbin
Gil Tereira
Zargle Amanal
Joseph Machado

Antonio Brito
Leo Serbe
Raymond J. Canuel
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Joas C. Leourerico
Afonso Libia

RESPONDENT EXHIBIT #2
(Rejected)

We are employees of Fall River Dyeing & Finishing and we wish not to be represented by U.T.W. of America Local 292. We wish to be treated fair by the Company with respect to wages and holidays and other matters.

Jesusino L. Melo
Jose M. Lavares
Daciel S. Conto
David Lourena
Bill Camara
Antonio Sousa
Henry J. Labuze
Tom Butterworth
Manuel Mediero
Marcelino Liavaro
Illeg.
Frank Borges
Victor Sousa
Joe Bettencourt
Manuel Abiantes
Jorge Ranas
Fernando Castanlar
Luis Carrar
Luis R. Eastos
Manuel Lindo
Carlos Possentel
Emanuel ——
Carlos Pereira
David Souza
Sero Cordeiro, Jr.
Roy Moreni
Alan R. Dubois
Mario Gonaso
Clerrios R. Esuores
Joseph Conti

Carlos Amaral
Ray Dubois
Edward Ramosa
Edward M. Raposo
Manuel Famm
Fernando Cabral

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
AUG 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1208

In the Supreme Court of the United States

October Term, 1985

—o—

FALL RIVER DYEING & FINISHING CORP.,
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

BRIEF OF PETITIONER

—o—

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QUESTIONS PRESENTED FOR REVIEW

This case presents important issues concerning the developing law of successorship, and the application of successorship principles to both the facts involved and the statutory rights of both employees and employers. Inextricably intertwined in these issues are two Board-promulgated theories: (1) the "continuing demand" concept, whereby a union's demand for recognition, once made and rejected by an employer, is considered to be continuing in nature, and (2) the "substantial and representative complement" standard, under which the determination of whether a new employer is a successor is postponed until its work force reaches a substantial complement, representative of the number and type of employees that will ultimately constitute the appropriate bargaining unit.

In the decisions below, a divided National Labor Relations Board, and a divided Court of Appeals, both determined that the Employer-Petitioner, Fall River Dyeing & Finishing Corp.. had engaged in unfair labor practices by refusing to recognize and bargain with the Union, Textile Workers of America, AFL-CIO, Local 292. The questions presented for review are:

1. Whether the National Labor Relations Board and the Court of Appeals have failed to follow Federal labor policy contained in successorship principles previously enunciated by this Court and have promoted concepts contrary to the Labor Management Relations Act, as Amended, under the totality of the circumstances herein, by finding that there was a substantial continuity in the employing enterprise, between a collapsed and liquidated business, Sterlingwale Corp.. and a new enterprise, peti-

tioner, Fall River Dyeing & Finishing Corp., such as to require Fall River to recognize and bargain with a Union which represented the production and maintenance employees of the former employer, Sterlingwale.

2. Whether the National Labor Relations Board and the Court of Appeals have failed to follow the successorship principles previously enunciated by this Court and have promoted concepts contrary to the Labor Management Relations Act, as Amended, and Federal labor policy, by relying on and applying simultaneously two Board-promulgated legal concepts, to find that Fall River Dyeing & Finishing Corp. engaged in unfair labor practices in violation of Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Textile Workers of America, AFL-CIO, Local 292, without a further demand having been made by that Union, after Fall River subsequently employed a substantial and representative complement of employees, a majority of whom had been employed by a former employer, Sterlingwale Corp. Those concepts are:

(a) The substantial and representative complement standard under which the time of determination of whether a new employer is a successor is postponed until its work force reaches a substantial complement, representative of the number and type of employees and job classifications, that will ultimately constitute the appropriate bargaining unit, without considering whether under the circumstances of this case, the time when the new employer reached a full complement of employees and classifications should have been determinative.

(b) The continuing demand doctrine, whereby in this case, the Union's demand for recognition and bargaining,

once made but lawfully rejected by Fall River, was nevertheless considered to be ongoing in nature, for approximately three months thereafter, until Fall River first employed a substantial and representative complement of employees, even though, to have accepted the Union's premature demand theretofore, would have constituted the unlawful recognition of a minority Union in violation of the Labor Management Relations Act, as Amended.

3. Whether the National Labor Relations Board and the Court of Appeals, in requiring Fall River to bargain with the Union, by applying both the continuing demand concept to a premature bargaining demand and the representative complement standard, to cause a bargaining obligation to become effective at that time, have deprived the employees of Fall River of their rights under the Labor Management Relations Act, as Amended, to bargain collectively through representatives of their own choosing and to refrain from any and all such activities, and have improperly compelled Fall River to bargain with the Union where a good faith doubt existed as to the Union's majority status.

PARTIES TO THE PROCEEDING

The caption of the case in this Court lists all parties to the proceeding whose judgment is sought to be reviewed, except United Textile Workers of America, AFL-CIO, Local 292, the charging party to the National Labor Relations Board.

Petitioner's parent company is Marcamy Sales Corp.

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

National Labor Relations Act, 29 U.S.C. 151, *et seq.*

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 7, 8, 9, 32

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§ 9(a), 29 U.S.C. 159(a) 2, 31

No. 85-1208

—o—

In the Supreme Court of the United States

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FALL RIVER DYEING & FINISHING CORP.,
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—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

BRIEF OF PETITIONER

—o—

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 775 F.2d 425 (1st Cir., 1985) (A-2-A-30).[1] The Decision and

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1. The following citation abbreviations are used herein: "A" refers to the Appendix to the Petition For a Writ of Certiorari. "JA" refers to the Joint Appendix.

Order of the National Labor Relations Board are reported at 272 NLRB 839 (A-31-A-43).

———o———

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1985. The Petition for a Writ of Certiorari was filed on January 16, 1986 and granted on May 27, 1986 (52 LW 3771). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

———o———

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.* which are reproduced at A-44.

§ 8(a)(1), 29 U.S.C. 158(a)(1)

§ 8(a)(2), 29 U.S.C. 158(a)(2)

§ 8(a)(5), 29 U.S.C. 158(a)(5)

§ 9(a), 29 U.S.C. 159(a)

———o———

STATEMENT OF THE CASE

On February 12, 1982, Sterlingwale Corp. (hereinafter "Sterlingwale"), a corporation owned by the Ansin

family for 30 years, began an immediate voluntary liquidation, shutting down its textile dyeing and finishing operation in Fall River, Massachusetts, and indefinitely laid off all of its production and maintenance employees, a number in excess of 150 (JA 48-49).[2] The closing was the result of unquestionable dire economic circumstances, involving the loss of millions of dollars. Sterlingwale's business was the dyeing and finishing of textiles, both as a converter of fabrics and as a commission dyer. As part of its business, it also engaged in a small amount of retail sales to textile companies but not to the general public.

Prior to making the decision to liquidate, which was precipitated by Sterlingwale's running out of capital to buy goods (JA 130-131), it had accountants make an analysis whether the Company could survive if it were to operate strictly as a commission finisher, based on paying normal wages. Sterlingwale determined that it could not survive as a commission finisher (JA 131-132).

The Sterlingwale employees had been represented for about 30 years by United Textile Workers Union of America, AFL-CIO, Local 292 (hereinafter "Union") (JA 60), under a series of collective bargaining agreements, the last of which was due to, and did, expire April 1, 1982 (JA 353-354, A-18). The collective bargaining agreements contained standard Union security provisions permitted by the National Labor Relations Act (JA 319).

After the February 12, 1982 layoff, the Union learned that Sterlingwale had not paid the life and health insur-

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2. There were two pages numbered 48 in the Official Transcript.

ance premiums required under the collective bargaining agreement, for the months of January and February, 1982. Union members at Sterlingwale who wished to keep up their coverage, personally paid premiums due for January, February, and March, 1982 (JA 78-81). Approximately 30 Union members paid, and approximately 125 refused to make any payment (JA 81). In addition, Sterlingwale also failed to pay vacation pay and severance pay also due its employees under the collective bargaining agreement (JA 81-83). The Union filed grievances with regard to nonpayment of severance and vacation pay, but did not proceed to arbitration with those grievances (JA 81-83). Instead, the Union filed unfair labor practice charges which, according to the Union's International Representative, were dismissed (JA 83-86). Although the Union sought the assistance of the insurance company and the Massachusetts Labor Department with regard to nonpayment of medical insurance premiums, life insurance premiums, vacation pay and severance pay, it was unsuccessful in obtaining any financing assistance for the bargaining unit employees (JA 86-87).

During the liquidation, Sterlingwale retained a skeleton crew to maintain the equipment and ship out pending orders up until about mid-July, 1982 (JA 115). On July 12, 1982, Sterlingwale's President, Leonard Ansin, met with two Union officials who "recognized" that Ansin was making every effort to have someone take over the plant (JA 67). No later than July, 1982 (JA 147), Ansin told the Union representatives he had located a Boston merchant to assist in the financing to get the business back off the ground, but for reasons beyond his control, there were parties outside his sphere of control that wouldn't

allow it to happen (JA 146-147). In the summer of 1982, all business activity ceased, an outside liquidator was brought in and an assignment for the benefit of creditors was made, and a foreclosure was held at public auction on the premises occupied by Sterlingwale. The petitioner Employer acquired most of Sterlingwale's machinery, furniture and fixtures and part of Sterlingwale's remaining inventory and materials, all at public auction. Sterlingwale's real property was acquired in late August, 1982 by Marcamy Sales Corporation, the parent corporation of Fall River Dyeing & Finishing Corp., which is wholly owned by Arthur Friedman. Thereafter, Fall River leased from its parent part of the real property formerly occupied by Sterlingwale (JA 238-243). Friedman had been approached by a machinery dealer with regard to the equipment and by a lawyer with regard to the land and building (JA 204-205). There is no evidence of any effort by Ansin which caused anyone to "take over the plant".

The Employer did not acquire any other assets of Sterlingwale, such as its trade name, good will, or customer lists, nor did it assume any of Sterlingwale's liabilities. The Employer did not obtain any personnel records or employee lists of Sterlingwale's former employees. There is no claim that the Employer is an alter ego or that Ansin has an interest whatsoever in the Employer.

In September, 1982, the Employer publicly advertised for employees in local newspapers. By September 20, 1982, it had hired six or eight employees and commenced preliminary start-up operations in one of three former Sterlingwale buildings. The preliminary operations involved cleaning, relocating and repairing machines for about four to six weeks, and thereafter, for about 4-5 weeks, experi-

mental production was undertaken to make sure that everything was in working order.

The Employer planned to engage solely in commission work which consists of the dyeing and finishing of fabric belonging to others, for a commission. In contrast, Sterlingwale had been primarily a "converter" whose business consisted of approximately sixty to seventy percent processing of its own fabric and thirty to forty percent commission finishing. At the time of its demise, Sterlingwale employed in excess of 150 production and maintenance employees who worked three shifts.

Fall River's production plan was to commence operation with a single shift of fifty-five to sixty employees and then to expand to a full two 10-hour shift operation by "March, April," 1983. (JA 208).

Such a two-shift operation is almost essential to the production process because the fabrics emerge from the process wet, and the entire operation, including drying, cannot be completed in eight hours. The plan was in fact achieved and the Employer began a two-shift operation in mid-January, 1983, and attained its goal of a full complement about the middle or end of April, 1983 (JA 208). At that time, the full complement of bargaining unit employees was 106-109 employees (JA 207).

On October 19, 1982, the Union sent the Employer a letter (JA 360-361), stating that "pursuant to the agreement between Sterlingwale" and the Union, the Union demanded recognition. The letter also stated that on October 28, 1982, a Union representative would call upon the Employer "for the purpose of negotiating a collective bargaining agreement." The agreement referred to by the

Union had expired on April 1, 1982, and Sterlingwale had ceased normal production operations on February 12, 1982.[3] The letter did not state that the demand was a continuing demand.

At the time of the Union's request and bargaining demand, the Employer employed 21 bargaining unit employees, 18 of whom were former Sterlingwale employees.

On October 21, 1982, the Employer's counsel wrote to the Union, advising that the Employer did "not intend to comply with [the Union's] request; and further . . . that there was no legal basis for same." (JA 362). Neither the NLRB nor the Court of Appeals found the Employer's rejection of the bargaining demand, and request for recognition to be illegal.

On November 1, 1982, the Union filed an unfair labor practice charge against the Employer claiming that the Employer had violated Sections 8(a)(1) and (5) of the Act. By mid-November, the Employer had hired employees in virtually all job classifications. They were engaged in start-up operations, cleaning and repairing machines for the first four to six weeks, and for the next four to five weeks, they engaged in experimental production on old Sterlingwale inventory.

On December 21, 1982, the Regional Director of the National Labor Relations Board, Region 1, issued a complaint charging the Employer with violating Sections 8(a)(1) and (5) of the Act because "On or about October

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3. This was the only request or bargaining demand made by the Union up until the decision of the National Labor Relations Board Administrative Law Judge on January 27, 1984.

21, 1982, and at all times thereafter, Respondent did refuse and continues to refuse to meet and bargain collectively, with the Union as the exclusive representative of all the employees in the unit. . . ." (JA 2-8). A hearing was scheduled for May 2, 1983.

The Employer answered the complaint on January 4, 1983, in substance denying that it was a successor employer to Sterlingwale, or that it had violated Sections 8(a)(1) and (5) of the Act (JA 9-11).

In mid-January, 1983, the first shift was in full operation and a second shift was begun. A total complement of fifty-five employees was employed, approximately thirty-six of whom were former Sterlingwale employees (A-5). At that time, some eight of twelve former supervisors of Sterlingwale were employed by the Employer as supervisors, and Herbert Chace, the Vice President of Sterlingwale, basically involved with its sales until its demise in February, 1982, was rehired as the Employer's Vice President running the plant and labor relations. Alfred Canuel, the former Plant Manager of Sterlingwale, was not rehired. Arthur Friedman, the President of the Employer and sole owner of the Employer's parent company, Marcamy Sales Corp., takes no part in the production or labor relations aspects of the Employer and is involved with the financial end of the business.

The Employer continued to hire and expand until it reached its goal of a full complement of employees in mid-April, 1983, consisting of 106 to 109 employees working two 10-hour shifts. By March 24, 1983, former Sterlingwale employees were a minority of the employees in the production and maintenance unit (A-38). By the time of

the hearing in May, 1983, over one-half of the dollar volume of the Employer's business came from the same customers with which Sterlingwale had at some time done business, although only 30-40 percent of Sterlingwale's business was finishing and dyeing while 100 percent of the Employer's business was finishing and dyeing.

The hearing began on May 2, 1983. In his Decision, dated January 27, 1984 the Administrative Law Judge held that the Employer had violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union on January 15, 1983. He held that the Employer was a successor to Sterlingwale, and that the Union's October 19, 1982 bargaining demand was premature when rejected by the Employer on October 21, 1982 since the Employer did not have a representative complement of employees, but that the demand was a continuing one, that the Employer was bound to comply with at such time as its operations reached a "representative complement, not a full complement" (A-38). He then ruled that the Employer's duty to bargain with the Union attached in mid-January, 1983, and he ordered the Employer to bargain with the Union, "upon request of the Union" (A-41). The Administrative Law Judge rejected the Employer's contention that the measuring period for the successorship determination should be when the Employer attained a full complement of workers in mid-April, 1983. The Administrative Law Judge held that the standard to be used, indicated by the Board, is representative complement, not full complement (A-38), without discussion and relying solely on *Aircraft Magnesium, a Division of Grico Corp.*[4]

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4. 265 N.L.R.B. 1344, *enforced,* 730 F.2d 767 (9th Cir., 1984).

Fall River presented two offers of proof at the NLRB hearing after the Judge refused to allow Fall River's Vice President, Herbert Chace, to testify about conversations he had with a number of former employees of Sterlingwale. The first conversation occurred in September, 1982, when Fall River first opened its doors (JA 213-214) and was to the effect that the employees were very dissatisfied with and wanted nothing to do with the Union. This occurred prior to receipt of the bargaining demand. The second conversation was with Rego, the Union Secretary, a former employee of Sterlingwale who had been hired by Fall River, and two other employees, to the effect that they had taken a poll of the Fall River employees and the "guys did not want this union to represent them." (JA 212-213). This latter conversation occurred after receipt and rejection of the Union's bargaining demand.

Rego testified that a few days before the hearing, at the suggestion of employees in the die house (JA 163-7), he prepared and circulated two Petitions, subsequently left on Herbert Chace's desk, to the effect that employees of Fall River did not wish to be represented by the Union. Those Petitions came about, according to Rego, because former Sterlingwale employees knew that the NLRB hearing would be held in a few days and that the Union sought through that hearing to get back in (JA 172). According to Rego's testimony, the Fall River employees did not want the Union back because they had not received their vacation pay (JA 164-170-175), emphasizing at the hearing "And that is the God's-honest truth." JA 164). Those petitions were signed by 89 employees. The 53 who signed one petition were former Sterlingwale employees. The 36 who signed the other petition were

new employees (JA 364-367). Those petitions (JA 364-367) were rejected as evidence by the Administrative Law Judge who allowed them to accompany the record as an offer of proof (JA 180). The exclusionary ruling was upheld by the Court of Appeals on the ground that since the Petitions were signed on April 29, 1983, they could not justify Fall River's refusal to bargain on January 15, 1983, the date fixed by the NLRB Administrative Law Judge on January 27, 1984 as the date when Fall River had attained a representative complement of employees, and the date when the successorship bargaining obligation began.

The National Labor Relations Board by a vote of two-to-one adopted the Administrative Law Judge's Decision in *toto* (A-31-32). The dissenting Member, Hunter, pointed out that at the time the Union made the demand on October 19, 1982, and the Employer refused it on October 21, 1982, the Employer did not employ a representative complement of unit employees, and, since the Union did not renew its bargaining demand at a time when the Employer had reached a representative complement — mid-January, 1983, he could find no bargaining obligation. Member Hunter, in essence, rejected the "continuing demand" concept of the majority, under the facts of the case (A-33). He expressly refrained from deciding or discussing whether the representative complement date, or full complement date, should have been applied to the successorship issue.

The National Labor Relations Board petitioned the Court of Appeals, for enforcement, which was granted by a divided Court with one Judge dissenting. The majority found that substantial evidence as a whole supported the Board's conclusions and that the legal principles it applied did not violate the Act (A-3). The dissenter, Judge

Torruella reasoned that enforcement should be denied for three distinct but related reasons, with which we agree. First, that the Board's "representative complement" rule contravenes the "full complement" rule previously enunciated by the Supreme Court (A-21). Second, that the Board's conclusion that Fall River is a "successor employer" is not supported by substantial evidence (A-25). Third, the factual basis for the presumption of continued majority support for the Union is lacking (A-29).

The issues involved in this case are of nationwide importance to both labor and management, and it is requested that they be resolved in favor of the Employer by this Court.

———o———

SUMMARY OF ARGUMENT

The key question in this case is whether under the totality of the circumstances herein, there was a substantial continuity of employing enterprise between the moribund Sterlingwale and the new employer, Fall River, as to cause Fall River to be found to be a successor to Sterlingwale and to be required to recognize and bargain with the Union which represented the former employees of Sterlingwale. The Board and Court of Appeals erred in finding Fall River to be a successor to Sterlingwale in that they failed to properly apply the principles previously enunciated by this Court as applicable in making such a determination. Under those principles, Fall River was a fundamentally different enterprise than Sterlingwale based on numerous factors either not considered or not given sufficient weight by the Board and the Court of Appeals.

Even if there has been a substantial continuity in the employing enterprise, under the specific circumstances of this case, the measuring date to determine whether Fall River should be required to recognize and bargain with the Union which represented the former Sterlingwale employees should have been the full complement date rather than the representative complement date. The Board has ignored the *caveat* of this Court in the *Burns* case, *infra,* that there are situations when the full complement date should be applied, and the Board has adopted and applied herein, a mechanical policy of utilizing the representative complement date without analysis, explanation or a rational relationship to the totality of the circumstances.

The Board's policy operates to deprive employees of their right to representation by representatives of their own choice and also deprives employers of their rights. Had the proper measuring date been applied herein, the full complement date. Fall River would not have had in its employ at that time a majority of employees who had formerly been employed by Sterlingwale, which had recognized the Union. Accordingly, Fall River would not have been required to recognize and bargain with that Union, and the former employees of Sterlingwale, whose sentiments towards the Union had changed since their permanent lay-off, as well as the new employees at Fall River, would have had the right to choose whether or not they wished to be represented by that Union.

The Board's continuing demand doctrine as applied in this case is irrational. It has been mechanically applied and operates in such a manner as to transform the lawful rejection by Fall River of the Union's recognition and

bargaining demand, unlawful at the time it was made, into an unlawful refusal to bargain by the Employer, without a renewed bargaining demand ever having been made at a time when it would have been lawful for Fall River to recognize and bargain with the Union. The continuing demand concept in a successorship situation creates unacceptable uncertainty in the standard of conduct required of a successor.

———o———

ARGUMENT

POINT I

THE NLRB HAS IGNORED OR REFUSED TO FOLLOW IN THIS CASE THE SUCCESSORSHIP PRINCIPLES PREVIOUSLY ENUNCIATED BY THIS COURT.

It has been observed that there are few governing principles in the area of successorship. *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir., 1976), *cert. denied*, 429 U.S. 921. This Court has noted in *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees Union*, 417 U.S. 249, 256, "Particularly in light of the difficulty of the successorship question . . . emphasis on the facts of each case as it arises is especially appropriate." The test established by this Court for a determination of successorship is whether there is substantial continuity between the employing enterprises, *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In making this determination, it is necessary to analyze whether there has been a change in the essential nature of the enterprise. *NLRB v. Band-Age, supra; NLRB v. Middleboro Fire Apparatus*, 590 F.2d 4 (1st Cir., 1978).

(1)

While the facts in this case are not disputed, the NLRB has ignored the standards set forth by this Court in *NLRB v. Burns, supra,* and other leading cases and has arranged the facts and weighed them in such a way as to ignore, or give little or no weight to certain facts while at the same time stressing other facts which are not dispositive of the issue whether there has been substantial continuity between employing enterprises.

In view of the importance of the relevant facts in reaching a successorship determination, the Court must examine the nature of the new and old employing enterprises in order to interpret and apply the principles of successorship which it has previously enunciated. In cases such as the instant one involving interpretation of Supreme Court pronouncements of controlling statutory principles, "deference to the Board may ordinarily be less appropriate." *International Association of Machinists & Aerospace Workers, AFL-CIO (Boeing Company) v. NLRB*, 595 F.2d 664, 673 n. 41 (C.A.D.C., 1978), *cert. denied*, 439 U.S. 1070.

Among the criteria considered by the Board and the courts in determining whether there is a substantial continuity between the employing enterprises are:

1. Business operations;
2. Whether the same physical plant is used;
3. Whether the same or substantially the same work force is used;
4. Whether the same jobs exist under similar working conditions;
5. Whether the same supervisors are employed;

6. Whether the same machinery, equipment and methods of production are used; and

7. Whether the same product is manufactured or the same services offered.

Aircraft Magnesium, a Division of Grico Corp., 265 NLRB 1344, *enforced*, 730 F.2d 767 (9th Cir., 1984); *Premium Foods, Inc.*, 260 NLRB 708, *enforced*, 709 F.2d 623 (9th Cir., 1983).

Not one of the foregoing factors by itself is determinative of the question whether there has been a substantial continuity between the employing enterprises. *NLRB v. Middleboro Fire Apparatus, Inc., supra; NLRB v. Hudson River Aggregates, Inc.*, 246 NLRB 192, *enforced*, 639 F.2d 865 (2nd Cir., 1981).

Sterlingwale had collapsed with no likelihood of revival. Its slow liquidation began February 12, 1982 immediately upon the lay off of all production employees. Its business, primarily that of a converter, ended as a result of lack of capital to acquire fabric. It began a slow liquidation of its remaining inventory and ceased to exist as a potential employer when its plant and equipment were sold in creditors' proceedings and eventually acquired by Fall River. After a production hiatus of seven months, a new employer, Fall River, began limited production as a commisison finisher.

Fall River acquired neither the trade name, good will nor other assets from Sterlingwale. It assumed none of Sterlingwale's liabilities. There was no transfer of employee personnel records between Sterlingwale and Fall River, no direct transfer of any employees or personnel.

and there was no expectation by Sterlingwale's employees of employment by Fall River. It is submitted that the employment of individuals who formerly worked for Sterlingwale resulted from factors unique to a small town with a shrinking industrial base. Many of the employees who had been permanently laid off by Sterlingwale in February, 1982, eagerly applied for positions at a new mill opening in their city. Production and maintenance employees were all hired on the open market from newspaper advertisements. Their employment started after a minimum of seven months had passed since their termination by Sterlingwale; in some cases, 11 months had passed since indefinite layoff by Sterlingwale.

Fall River began its operation by leasing only one of Sterlingwale's three buildings from a company which had purchased the real property from the defunct firm at foreclosure sale. Although Fall River uses machinery and equipment which at one time may have belonged to Sterlingwale, it too was purchased on the open market at a foreclosure sale. Thus, the fact that the physical plant and equipment once were a part of Sterlingwale's operation should be totally irrelevant to the successorship determination. Furthermore, with regard to the issue of workforce, a textile business, whether operating on a converter or a commisison basis, will have employees working in similar job classifications. This is not a controlling factor considering the nature of any textile operation. However, there remains a substantial dissimilarity in working conditions and operations not factually disputed, but not referred to or commented upon by the NLRB. This disparity in working conditions has to do with the shifts. Rather than operating on the basis of three shifts a day,

Fall River intended to run its plant when at full complement, with only two 10-hour shifts. The new firm also employed no sales force.

Fall River's business is fundamentally different from that of Sterlingwale's. While the former operation depended largely on converting, Fall River's operation relies solely on commission work. A commission business does not require the capital necessary to purchase fabrics or the need for a sales force or a retail outlet to sell them. Fall River operates in a significantly different mode than Sterlingwale. It has a smaller manufacturing plant, substantially less employees (workers and supervisors), fewer work shifts and longer working hours.

Furthermore, there has been no transfer of customer lists or customers between Sterlingwale and Fall River which might justify the NLRB's conclusion there was a substantial continuity of business operations. It is submitted that many former Sterlingwale customers who also became Fall River customers were acquired by competing for them in the open market. Although the NLRB considered that in dollar volume over one-half of Fall River's Customers had been customers of Sterlingwale, the NLRB ignored the fact that one of the major customers is Fall River's parent company, Marcamy Sales. If its purchases are considered, the portion of continuing customers drops to one-third.

The NLRB, in making its analysis of the factors needed to find successorship, has entirely neglected the differences in concept between the two operations. The NLRB has taken too narrow a view of the business operation as a factor in the overriding question of whether there

is substantial continuity in the employing enterprise. *NLRB v. Alamo White Truck Services,* 273 F.23d 238 (CA 5, 1959). The services offered by Sterlingwale were essentially in the conversion process, although admittedly some commission work was done only as it became short of cash to purchase textiles to convert for its own account. In contrast, finishing work is the exclusive business of Fall River. Fall River's sole intention is to earn commissions as a finisher where Sterlingwale failed in a business involving primarily converting. There was no basis for the Administration Law Judge and NLRB to ignore the basic practices in the textile industry with regard to finishing work and make a finding based on dollar volume alone that " . . . a substantial part of Respondent's business is linked with Sterlingwale." (A-37).

The alleged links between the two enterprises are too tenuous to support the NLRB's finding of successorship based on the test of substantial continuity of the employing enterprise. As demonstrated above, there is a substantial difference in the nature of operations which precludes the finding of successorship in the circumstances of this case.

(2)

While there is no single factor which will prevent a finding of successorship, the following factors when combined have defeated such a finding:

1. A long hiatus in the resumption of operations;

2. A difference of location at the resumed operation;

3. A changeover of the supervisory hierarchy;

4. The absence of a carryover of customers or markets supplied; and

5. A difference in the scale of the operations and the products produced and in the method of production, etc.

Radiant Fashions, Inc., 202 NLRB 938; *Galis Equipment Co.*, 194 NLRB 799; *Georgetown Stainless Manufacturing Corp.*, 198 NLRB 234; *Cagle's Inc.*, 218 NLRB 603; *Atlantic Technical Services Corp.*, 202 NLRB 169, *enf.* 498 F.2d 680 (C.A.D.C., 1074); *Lincoln Private Police,* 189 NLRB 717; *Co-op Trucking Co.*, 209 NLRB 829.

The NLRB has found the continuity of the employing enterprise destroyed where the continuity, other than that of the work force, consisted primarily of the acquisition of a portion of the customers of a moribund company solicited in the open market. *Co-op Trucking, supra; Lincoln Private Police, Inc., supra.*

In the case at bar, we find a major changeover in the supervisory hierarchy. The number of supervisors has been substantially reduced from 18 to 12, including employment of 4 new supervisors who had not been previously employed by Sterlingwale. The former plant manager has been terminated and not rehired by Fall River. Likewise, as noted above, there is a substantial change in the firm's market, suppliers and customers. The market is no longer the conversion and sale of goods owned by the converter. The market now consists of processing the goods of others as a commisison dye house and not direct sale of its own product line. With regard to customers, only about one third of Sterlingwale's customers are serviced by the Employer exclusive of Fall River's parent corporation. Furthermore, as a result of a hiatus in any production of at least 7 months, there was not any carryover or

transference of customers that might justify linking the two employers.

Finally, Sterlingwale's employees had no reasonable basis for anticipating that their employment might resume at the same location after their indefinite layoff began in February, 1982. The substantial hiatus in any operations from mid-February, 1982 until mid-September, 1982, the liquidation of inventory as well as the foreclosure sale of the physical plant and equipment, and lack of any financial "angel" to infuse capital into Sterlingwale negates any reasonable expectation by former Sterlingwale employees that they would resume their old jobs. Their union contract expired in April, 1982, and their Union made no effort to renew it, or to even take their benefit claim grievances to arbitration.

It is submitted that the NLRB has erred in ignoring the significance of the lengthy hiatus on the employees' expectation of rehire. In *Aircraft Magnesium, supra,* the NLRB held, at p. 1346: "Further, the significance of a hiatus to successorship status is its effect on the employees' expectation of rehire." Unlike the present case, in *Aircraft Magnesium* the employer desired in reality to continue in the predecessor's business. In that case, after a bankruptcy and a layoff of bargaining unit employees, there was a hiatus of operations of less than one month during which Aircraft Magnesium purchased not only all the physical assets of its predecessor, but its books and records, including customer lists, invoices and operating permits. There was a stipulation that a majority of the customers and suppliers remained the same. The new company expressed interest in rehiring all of the predeces-

sor's employees the day after the purchase was complete and subsequently carried out that intention by hiring them.

In the instant case, such an intent is totally absent. The record here shows no intent to hire former employees; the Employer ran a newspaper ad in the community paper in order to begin staffing the new enterprise.

The facts underscore that the employees who responded to newspaper advertisements and applied for a job with Fall River were in actuality applying for a new job, under new management at a different mill serving different customers and a changed market. In light of the substantial changes in the employing enterprise discussed above, this Court should determine that the NLRB incorrectly applied the law to the facts and failed to properly apply this Court's successorship principles.

(3)

It is respectfully submitted that the Court of Appeals has apparently misapplied the intent of the Supreme Court in *Burns, supra,* with regard to situations in which it is not appropriate to have an employer initially consult with the employees' bargaining representative before he fixes terms of employment. This Court clearly indicated that in those situations, it may not be clear until the successor employer has hired his *full complement* of employees that he has a duty to bargain with the Union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit, as required by Section 9(a) of the Act. The Court of Appeals herein has disregarded this Court's carefully formulated full complement standard and instead has es-

poused the Board's substantial and representative complement standard, reasoning that the substantial and representative complement standard embodies the balance between early representation and maximum participation "that lies at the heart of the 'full complement' concept," (A-10). The balancing concept was enunciated in *NLRB v. Pre-Engineered Building Products, Inc.,* 603 F.2d 134 (10th Cir., 1979), clearly as an aid in determining what is meant by "full complement" in situations where it is difficult to determine when a full complement has been achieved, particularly when dealing with a totally collapsed business where a successor may require some time to rebuild production, demand and work force. *Premium Foods Incorporated v. National Labor Relations Board,* 260 NLRB 708, *enforced,* 709 F.2d 623 (9th Cir., 1983); *Pacific Hide & Fur Depot, Inc. v. NLRB,* 553 F.2d 609, 612-613 (9th Cir., 1977).

The Administrative Law Judge, however, made no analysis with regard to ascertaining when Fall River would first have working a full complement of employees. He rejected this Court's full complement standard and instead substituted a standard different from the full complement standard. The Board Judge simply stated "However, the standard to be used indicated by the Board is representative complement, not full complement." (A38). The Board then applied a standard of "substantial and representative complement of its work force" (A32) totally ignoring this Court's full complement standard.

The Court of Appeals' majority apparently believed that the "full complement" principle was applicable herein (A-10) but that in fixing the appropriate date at which the bargaining obligation arises, a balancing of the ob-

jective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible, had to be made (A-10). There is fundamental error here. This Court in *Burns, supra* reasoned that the duty to bargain with the Union cannot at times be clear until the successor employer has hired his full complement of employees. By using a balancing concept, the Court of Appeals equated the full complement date with a different period of time, that being the date when a substantial and representative complement of employees in bargaining unit positions have been hired (A-10).

The distinction is critical in the case at bar because, on January 15, 1983, the date fixed by the Board as the date when a representative complement of employees were employed by Fall River, a majority of those employees at that date, had been formerly represented by the Union while employed at Sterlingwale. However, if a later date is used, in mid April of 1983, when the second shift reached full complement in accordance with the original and unchanged plans of Fall River, the bargaining unit work force did not consist of a majority of employees who had formerly been represented by the Union while employed at Sterlingwale, and no bargaining obligation should have attached to Fall River.

It is urged that the balancing approach suggested by the Courts of Appeals in *Pre-Engineering Building Products, supra*, and in *Premium Foods, Inc., supra*, and by the Board in *NLRB v. Hudson River Aggregates, Inc.*, 246 NLRB 192, *enforced*, 639 F.2d 865 (2nd Cir., 1981) is a faulty approach inasmuch as it unrealistically assumes

that in all successorship cases, former employees of a collapsed employer never wish to change their former bargaining representative. Such an assumption is unrealistic in the totality of the circumstances herein when dealing with the former employees of Sterlingwale. Those production employees who lost their jobs when Sterlingwale closed may have been out of work for as much as 11 months until some of them were hired by Fall River. A large number of those who were hired by Fall River expressed dissatisfaction with their previous bargaining agent who utterly failed to protect their life insurance, medical insurance, severance pay and vacation benefits. Those same employees may have been compelled to belong to the Union, by virtue of the Union shop provision with Sterlingwale.

The reality of the situation was demonstrated by the testimony of the Union's own Secretary, Norman Rego. Rego canvassed the bargaining unit employees with regard to their representation wishes approximately one week before the May 2, 1982 NLRB hearing and a great majority of those employees, 89 out of a maximum of 110, did not want to be represented by the Union. Rego explained this lack of support for the Union was caused by the employees' not having received their vacation pay, and, in Rego's words, "And that is the God's-honest truth." (JA 164).

The NLRB has offered the following explanation of the balancing approach:

> "On the one hand, employees may not select an exclusive bargaining representative until there is a substantial complement, representative of the skills and types of employees who will ultimately constitute the

unit. On the other hand, once a substantial and representative complement has been hired, the employer may not defer the employees' right to bargain collectively through representatives of their own choosing until some indefinite date in the future when production will be at full capacity and the bargaining complement will be deemed full." *NLRB v. Pre-Engineered Building Products, Inc., supra* at 136, fn. 1.

This Board reasoning never considers that after a hiatus of 7-11 months, employees may not want this Union. It also assumes that the full complement date will be some indefinite date in the future. The facts in the instant case show that the Employer had a definite plan for the commencement of production and the methodical building up of the work force as production increased, including the introduction and filling of a second shift within a definite time frame. That plan existed as at the time that the Employer began hiring in September of 1982. There is no evidence, nor should there be any inference that Fall River would not have disclosed its plans to any one who had a legitimate interest who sought to inquire. As a matter of fact, the Employer met its projected date for a full complement. All of the foregoing is completely ignored by the Board in woodenly holding that the only test to be applied is the representative complement test. Thus the decisions of the Board and the Court of Appeals in the instant case conflict with the carefully reasoned successorship principles previously enunciated by this Court.

POINT II

THE NLRB's SUBSTANTIAL AND REPRESENTATIVE COMPLEMENT DOCTRINE AS APPLIED IN THIS CASE CONTRAVENES IMPORTANT REPRESENTATION RIGHTS GUARANTEED EMPLOYEES UNDER THE LABOR MANAGEMENT RELATIONS ACT, AS AMENDED

The Board and the Court of Appeals have stretched the successorship concept to an unreasonable extreme in the case at bar in finding Fall River to be a successor employer, and directing it to recognize and bargain with the Union which represented the former Sterlingwale employees, without allowing all of Fall River's employees the right to express their choice of bargaining representative.[5] The concerns expressed in the concurring and dissenting opinions by Justices Rehnquist, Brennan and Powell in *NLRB v. Burns International, Inc., supra,* concerning the needless sacrifice of employee and employer rights to independently order their own affairs as a result of successorship principles have materialized as a result of application of the representative complement doctrine in this case. Not only do employees have important rights under Section 9(a) of the Act to representation by bargaining representatives of their own choice, but they have the right not to have any union representation if they so desire. Employers have recognizable rights as well. Among those rights are the rights not to be compelled by

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5. By virtue of the Union Security provision in the contract between Sterlingwale and the Union, which bargaining relationship goes back almost 30 years, it is likely that the majority of the former Sterlingwale employees never had the opportunity to express their choice of bargaining representative.

the mechanical application of the Board's representative complement doctrine, to have to recognize and negotiate with non representative Union on behalf of its employees. The dissenters in *NRLB v. Burns International, supra,* recognized that the successorship doctrine, carried to its ultimate limits, runs counter to well-established principles of labor law, and may lead to the sacrifice of employees' representation rights and employers' rights to run their businesses being sacrificed unnecessarily upon the altar of industrial peace.

The initial concern of this Court expressed in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, was the need to grant some protection to employees from a sudden transformation of their employer's business, which resulted in the substitution of a new legal entity, not bound by the collective bargaining agreement under principles of contract law. These concerns do not exist in the circumstances of the instant case.

Another consideration frequently advanced by this Court for the application of the successorship doctrine has been the need for continuity in industrial labor relations and the concomitant avoidance of industrial strife, which presumably follows from such a continuity. Thus, the successorship doctrine presents a conflict between the preservation of industrial peace and the right of the majority of employees to determine their bargaining agent, which right the Act was designed to preserve. In the case at bar, where the relationship between the first employer and the second employer is as attenuated as it is here and the employees of the first employer had no reasonable expectation to ever again become employed by Sterlingwale,

which had a bargaining relationship with the Union at the time of their termination, the right of free choice of bargaining representative guaranteed those employees by the Act is undercut by the result reached here by the NLRB and Court of Appeals.

A very simple alternative existed in the instant case to protect the rights of all of the employees. After the Union's bargaining demand was rejected by Fall River in October of 1982, it could have filed a representation petition, with the Board if it desired, if it could have obtained a 30 percent showing of interest among bargaining unit employees. If that alternative had been chosen, then, at an appropriate time determined by the Board, a secret ballot election would have been conducted so that all of the employees at Fall River could have expressed their representational wishes. For the apparent reason that the Union lacked the support of the former employees of Sterlingwale, it avoided a secret ballot election and proceeded to file unfair labor practice charges bringing into play the successorship doctrine which operates to deprive employees of their right to choose a bargaining representative.

In a successorship situation, the time when the bargaining obligation can be determined is frequently at the time of transfer of ownership or when actual operations began. This Court has recognized, however, that:

> "In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a Union, since it will not be evident until then that the bargaining representative represents a majority of the employees as required by Section 9(a) of the Act. 29 U.S.C. § 159(a)." *NLRB v. Burns International Security Services, Inc., supra* at 295.

In the case at bar, the NLRB has arbitrarily fixed January 15, 1983 as the date to determine whether the Employer's work force is composed of a majority of former Sterlingwale production and maintenance employees. It selected the date by mechanically following the substantial and representative complement principle set forth in *Aircraft Mangesium, supra,* at p. 1345, where the NLRB stated:

> "It is well settled that the significant time frame for determining what percentage of a purchaser's employees were former employees of a predecessor is when a demand for bargaining has been made and a representative complement of an employer's work force is on the job."

No such general or even presumptive standard has been formulated or approved by this Court. The last word on the critical measuring date was in the *Burns* case in which the Court expressed its concern that there are situations when the measuring time frame should be at a point when there is a full complement of workers.

We submit that there is no justification in the case at bar to ignore the clear concern of the Supreme Court for the representation rights of employees. The instant case is precisely one of the situations referred to by the Court in *Burns*, particularly when we consider the substantial differences between Burns and Fall River that militate in favor of Fall River and demonstrate a good faith doubt with regard to the Union's majority status. Those major differences are, the lack of any expression of union preference by the employees for many years (Fall River) versus a very recent election and certification (Burns), the nonexistence of a labor contract (Fall River),

in contrast to one in effect (Burns), the start up of a new business entity after a substantial hiatus following the liquidation of the original employer (Fall River) versus a continuity of operations (Burns), the testimony of the Union's Secretary regarding the lack of support for the Union expressed by a majority of the Fall River employees at the full complement date.

The NLRB has not, under the circumstances of this case, followed the policies contained in Section 9(a) of the Act, by imposing the Union on the employees of Fall River, a minority of whom were formerly represented by the Union as of the full complement date, by mechanically asserting that the substantial and representative complement date is effective to determine majority representation.

POINT III

THE NLRB'S CONTINUING DEMAND DOCTRINE AS APPLIED IN THIS CASE CONTRAVENES THE LABOR MANAGEMENT RELATIONS ACT, AS AMENDED, BY IMPROPERLY COMPELLING THE EMPLOYER TO BARGAIN WITH A UNION WHERE A GOOD FAITH DOUBT EXISTED AS TO THE UNION'S MAJORITY STATUS.

There is no basis for finding that Fall River unlawfully refused to recognize the Union in violation of the Act. This is so because Fall River did not reject the Union's request for recognition at a time when the Employer would have been obliged to honor such a request either under successorship principles or under the Act. Furthermore, there is no claim that the Employer engaged in any other unlawful practices which would have made a subsequent demand futile.

The original demand for recognition on October 19, 1982 was unquestionably premature and was lawfully rejected. The Administrative Law Judge in his decision stated that the demand for bargaining by the Union claiming to represent a majority of former employees must be made when the new employer is operating at a "representative capacity" (A-37-38). However, he went on to hold that if the new employer is not at that capacity at the time of the demand, the demand is of a "continuing nature", and once the employer reaches a representative capacity, the bargaining obligation will attach. (A-38). *Aircraft Magnesium, supra.* The NLRB's construction and the Court of Appeals' affirmance have retroactively transformed the Employer's lawful good faith rejection of the Union's demand into proscribed conduct under Sections 8(a)(1) and (5) of the Act.

It is not denied by the NLRB that the Union's original demand for recognition and bargaining, which was made on October 19, 1982, and rejected by the Employer on October 21, 1982, was in effect an illegal demand. At that time, there was neither a representative, nor a full complement of workers hired by Fall River. If the Employer had acceded to the premature recognition demand, it would have been a violation of Section 8(a)(2) of the Act since the Employer would be recognizing a non-majority union. *Hedstrom Company v. NLRB,* 558 F.2d 1137 (CA 3, 1977), *cert. denied,* 450 U.S. 996. The same is also true on November 1, 1982, when the Union filed its unfair labor practice charges, and on December 21, 1982, when a complaint was issued by the Regional Director, and even on January 4, 1983, when Fall River answered the complaint.

The Administrative Law Judge found that the duty to bargain with the Union attached for the Employer in mid-January, 1983 at the time the plant was running one shift at full capacity. It should be noted that no new demand was made in January, 1983 or at any time after the initial one.

It is the very same illegal demand in violation of Section 8(a)(2), that the NLRB and Court of Appeals have retroactively condoned by using a continuing demand concept. Judge Torruella noted the irrationality of the continuing demand concept under the facts of this case in his dissent in the court of Appeals. He stated:

> "By what logic or reasoning can events that took place thereafter retroactively be made to transform these good faith rejections by Fall River into illegal conduct? At best the Board's ambiguous criteria create an unacceptable uncertainty in the standard of conduct required of successors." (A-29).

The Administrative Law Judge and the NLRB claim that since the original demand on October 19, 1982, was made at such time that the new Employer was not operating at a representative capacity, the demand automatically continues. "Once the employer reaches a representative capacity, the bargaining obligation will attach." (A-38). However, neither the Administrative Law Judge in his decision, nor the NLRB majority in their decision, cite any authority or provide any explanation or rationale for the principle that a bargaining demand in a successorship situation made by a union at a time when the employer is not operating at a representative capacity is of a continuing nature and continues until such time as the new employer reaches a representative capacity, at which time a bargaining obligation will attach to the new employer.

Board Member Hunter, correctly refused to find any basis for finding that the Employer unlawfully refused to recognize the Union, reasoning that the Union did not repeat its initial demand after it attained a representative complement of employees (A-33) thereby rejecting the continuing demand theory applied by the Board majority in this case.

The uncertainty of such a rule will undoubtedly act to deter employers from investing in the assets of defunct businesses. If an entrepreneur seeks to start a new business using assets purchased on the open market, months earlier, from the "estate" of a failed business, he should not have to worry that at some indefinite time in the future, he can be found to have violated the Act, retroactively. In this respect, the NLRB's continuing demand concept, if applied in conjunction with the representative complement standard, might deter new investments which would provide new jobs for laid off workers.

In *Hedstrom v. NLRB, supra*, the Court of Appeals for the Third Circuit disagreed with the NLRB-promulgated concept of "continuing demand", also in an unfair labor practice context, reasoning that if it were adopted, the employer might be forced to violate Section 8(a)(2) of the Act by recognizing a minority union. The Court held, at p. 1148:

> "We cannot accept any concept of continuing demand which requires an employer either to recognize a minority status union, or to risk a § 8(a)(5) violation in the event the minority union attains majority status sometime after the demand, unless it gives renewed notices to the employer that it has attained majority status since the last demand. If an employer were to recognize and bargain with a union which does not represent a majority of the employees in the appropriate unit, it commits an unfair labor practice in violation of § 8(a)(2) which prohibits an employer from aiding any minority union. *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961)."

This Court is respectfully urged to reject the NLRB's continuing demand concept which has been misapplied in the successorship context by the NLRB and the Court of Appeals. The Employer did not violate the bargaining obligations set forth in the Act, by refusing to recognize the Union when it had a good faith doubt as to the Union's majority status as a matter of law, when the demand was made, and as a matter of fact, subsequently.

—o—

CONCLUSION

For the foregoing reasons, this Court should reverse the order enforcing the Board's order, and dismiss the complaint against Fall River.

Respectfully submitted,

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OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1986

FALL RIVER DYEING & FINISHING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found that there was substantial continuity between the operations of petitioner and its predecessor and that, having hired a substantial and representative employee complement of which a majority were former employees of its predecessor, petitioner was a successor employer obligated to recognize and bargain with the union that had represented its predecessor's employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1208

FALL RIVER DYEING & FINISHING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A30) is reported at 775 F.2d 425. The decision and order of the National Labor Relations Board (Pet. App. A31-A43) are reported at 272 N.L.R.B. 839.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on October 18, 1985. The petition for a writ of certiorari was filed on January 16, 1986, and granted on May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer --
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) * * *.

Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

STATEMENT

1. a. Until 1982 the Sterlingwale Corporation operated a textile dyeing and finishing plant in Fall River, Massachusetts. Sterlingwale's production and maintenance employees had been represented for nearly 30 years by United Textile Workers of America, AFL-CIO, Local 292 (the Union). The parties' last collective bargaining agreement extended to April 1982. Pet. App. A35, A36, n.1; J.A. 60-61, 189, 317-355.

Sterlingwale's operations consisted of both "converting" and "commission" dyeing. As a converter Sterlingwale bought unfinished fabrics for its own account, dyed and finished them, and then sold the fabrics to apparel manufacturers. Working as a commission dyer, Sterlingwale dyed and finished fabrics owned by other customers to the customer's specifications. In its early years, Sterlingwale had engaged almost exclusively in commission dyeing, but in the early 1970s it shifted principally into converter work. When it encountered economic problems in 1979, Sterlingwale began shifting back toward commission work. Although the financing and marketing aspects of the two types of business vary, the production process for dyeing and finishing fabrics is the same

whether the work is done on a converting or a commission basis. Pet. App. A35; J.A. 96-103, 122-155, 127-129, 192, 218.

As a result of economic difficulties, Sterlingwale's production workforce declined from more than 200 in 1979 to about 150 in 1982 (J.A. 92-93, 192). In response to Sterlingwale's economic decline, the Union agreed in October 1980 to extend the parties' then-current collective bargaining agreement without any wage increase (J.A. 64, 353-354). In February 1982 Sterlingwale laid off all its production employees. It kept a skeleton crew of employees to maintain the plant and to ship inventory (Pet. App. A35-A36; J.A. 63-65, 77-78, 147-148).

Following the layoff Union representatives met with Sterlingwale officials on a number of occasions to bargain over the economic effects of the layoff on employees. Sterlingwale's president, Leonard Ansin, still hoped to resurrect the business or have "somebody take over the plant," and he communicated that interest to Union representatives during meetings held in the summer of 1982. At one meeting in July, the Union offered to meet with any prospective buyers in an effort to "work something out" and keep the plant operating. J.A. 65-68, 86, 146-147.

By July or August 1982, however, Sterlingwale had decided to go out of business, and it executed an assignment of assets for the benefit of its major creditors (Pet. App. A36; J.A. 68-69, 115). The holder of the primary mortgage on the Sterlingwale property was Lila Ansin, the mother of Sterlingwale president Leonard Ansin and herself an officer of the company. In addition, Massachusetts Capital Resource Company (MCRC) held a security interest in Sterlingwale's machinery and equipment (J.A. 113-114, 190).

At about the same time that Sterlingwale decided to go out of business, petitioner Fall River Dyeing and Finishing Corporation decided to acquire the assets and inventory of Sterlingwale and to continue the operation as a commission dyeing business. Petitioner was formed for that purpose in August 1982 by Herbert Chace, a 27-year Sterlingwale employee and its vice president in charge of sales and plant operations until his resignation in February 1982,[1] and by Arthur Friedman, president of Marcamy Sales Corporation, a major customer of Sterlingwale. Friedman became petitioner's president, and Chace became vice president in charge of operations and secretary. J.A. 188-189, 190, 199, 203-204, 273-277. Petitioner was interested in acquiring Sterlingwale's facilities specifically because of the known availability of a "competent and capable" workforce and the suitability of Sterlingwale's plant and machinery (J.A. 204, 222-223).

On August 30, 1982, Friedman, through his other corporation, Marcamy Sales, signed an agreement with Sterlingwale's creditors—Mrs. Ansin and MCRC—to purchase Sterlingwale's plant, real property, and equipment (J.A. 238-272). On September 2, 1982, Marcamy Sales, petitioner's parent corporation, conveyed the equipment and leased part of the plant and property to petitioner (Pet. App. A36; Pet. Br. iv.; J.A. 199-200, 278-290). In a separate transaction, petitioner acquired a substantial amount of Sterlingwale's inventory and raw materials from a professional liquidator that Sterlingwale had employed to sell its assets (Pet. App. A36; J.A. 115, 200-202, 290-293).

[1] Although in 1981 and 1982 Chace had been principally involved in sales, while the day-to-day running of the plant was left to plant manager Alfred Canuel, Chace participated in collective bargaining with the Union and in handling employee grievances during his tenure at Sterlingwale (J.A. 189, 232).

b. Petitioner began operating out of the former Sterlingwale facilities in September 1982, and it hired its first employees on September 20 (Pet. App. A38; J.A. 206-207, 220).[2] In making its hiring decisions, petitioner took into account whether an applicant had experience as a former employee of Sterlingwale (J.A. 223). The employees initially hired spent four to six weeks cleaning and repairing machines and doing other startup operations, and an additional month in experimental production to ensure that everything was in working order (J.A. 225-228).

On October 19, 1982, the Union requested that petitioner recognize it and proposed a date for collective bargaining negotiations. On October 21 petitioner responded that it did "not intend to comply with your request" and that the Union's bargaining request had "no legal basis." Pet. App. A38; J.A. 360-362. At the time of petitioner's refusal to bargain, petitioner had hired about 20 employees, of whom all but three were former Sterlingwale employees (Pet. App. A38; J.A. 294-302). Petitioner's initial production goal was to reach one full shift operation of 55 to 60 employees. After that goal was achieved, petitioner planned to "see how business would be," and then if business warranted to expand to a two-shift operation. Pet. App. A38; J.A. 207-208.

By November 1982, employees had been hired in virtually all job classifications. By mid-January 1983 the first shift was in full operation and petitioner had begun a second shift. At that time, petitioner had reached its initial hiring goal of about 55 employees, and was employing at least 50 percent of those it would ultimately employ in the majority of job classifications. Of the 55 employees hired

[2] Applications for employee and supervisory positions were solicited through an advertisement placed in the local newspaper. In addition, Herbert Chace, petitioner's vice president and secretary, personally contacted supervisors with whom he had worked at Sterlingwale and asked them to work for petitioner. J.A. 197-198.

by mid-January, 36 were former Sterlingwale employees. Pet. App. A5, A31-A32 n.1, A38; J.A. 55-56, 225-227, 294-302.

Petitioner performed commission dyeing and finishing work as had Sterlingwale, but it did this type of work exclusively, performing no converter work. It introduced no new service or product line. The production process remained basically unchanged and the employees performed the same jobs that had been performed at Sterlingwale. Petitioner used the machinery formerly used by Sterlingwale and retained most of the same job classifications. Pet. App. A36-A37; J.A. 152-156, 199-200, 205-206, 294-302, 356-359. Herbert Chace, petitioner's vice president and secretary, continued to be in charge of plant operations and involved in labor relations as he had been with Sterlingwale. Eight of petitioner's supervisors were former Sterlingwale supervisors and three of the other four were former Sterlingwale employees. Over half of the dollar volume of petitioner's business came from former Sterlingwale customers. Pet. App. A6, A37-A38; J.A. 189, 190, 196, 209-210, 300, 314-316.

Beginning in early March 1983, petitioner increased its hiring rate, and by the end of that month its employee complement approached 100, of whom 51 were former Sterlingwale employees. Either late in March or early in April, petitioner's workforce grew to 105, at which point former Sterlingwale employees became for the first time less than a majority of petitioner's workforce. Pet. App. A38; J.A. 294-302.

2. Adopting the decision of the administrative law judge (ALJ) (Pet. App. A31-A32), the Board, with one member dissenting, found that the change of ownership did not materially alter the employees' working conditions or the nature of the enterprise, and that on January 15, 1983, petitioner had employed a substantial and representative complement of employees, a majority of whom had

been employed by Sterlingwale. On the basis of those findings, the Board concluded that petitioner was a successor employer to Sterlingwale and was obligated to bargain with the Union as of January 15, 1983 (*id.* at A31-A32 n.1, A35-A37). The Board also concluded that the Union's October bargaining request constituted a continuing demand for recognition and bargaining (*id.* at A31-A32 n.1, A37-A39). Accordingly, the Board ruled that petitioner had violated Section 8(a)(5) and (1) of the National Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the Union on and after January 15, 1983, when its bargaining obligation arose (*ibid.*). The Board's order required petitioner to bargain with the Union upon its request (Pet. App. A41).[3]

3. The court of appeals, one judge dissenting, enforced the Board's order (Pet. App. A2-A30). The court upheld as supported by substantial evidence the Board's finding that petitioner was the successor to Sterlingwale (*id.* at A8). The court found that the differences between petitioner's business and Sterlingwale's "are only indirectly related to the interests" of the bargaining unit employees in representation and "are not sufficiently significant to require a finding that the continuity of the enterprise, viewed from the employees' standpoint, was broken" (*id.* at A9).

In addition, the court found that, where it cannot be determined at the outset of the transition whether a union represents a majority of a new owner's employees, the Board may fix as the date for determining the successor's bargaining obligation the date on which the new owner has hired a "substantial and representative complement" of its

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[3] Board Member Hunter dissented from the Board's decision on the ground that petitioner did not have a representative complement of employees on the date that the Union demanded recognition and the Union failed to renew its demand at the point when a representative complement had been hired.

employees (Pet. App. A10-A12). The court concluded that the Board's substantial and representative complement standard effectively balances " 'the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible' " (*id.* at A10 (footnote omitted), quoting *NLRB* v. *Pre-Engineered Building Products, Inc.*, 603 F.2d 134, 136 (10th Cir. 1979)). The court upheld as reasonable the Board's findings that petitioner's operation was at a near-normal level by mid-January 1983 and that petitioner had hired a substantial and representative employee complement by that time. Accordingly, because a majority of the workforce had been represented by the Union at Sterlingwale, the court ruled that petitioner's bargaining obligation attached at that point. Pet. App. A12.

The court also upheld the Board's conclusion that the Union's October 1982 bargaining demand constituted a continuing request for recognition and bargaining that petitioner was required to honor once it had hired a representative complement of employees in January 1983. The court noted that, in the successorship context, "[u]nions often lack precise information about when a change in ownership of a firm is to take place, * * * and what plans, if any, the new owners have for expansion or modification of the enterprise," and that "it is thus not uncommon for bargaining demands to be made" before a representative complement has been hired (Pet. App. A14). Noting further that a successor's bargaining obligation turns on whether it has hired a representative employee complement and whether a majority of the workforce came from its predecessor, and not on the union's initial showing of majority support, the court found that "[t]he employer, unlike the union, can readily reach this determination on its own by examining whether the job classifications for the operation have been 'filled or

substantially filled' and whether the operation is in 'normal or substantially normal production' " (*ibid.* (footnote omitted), quoting *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 628 (9th Cir. 1983)). Thus, the court concluded that it is not unreasonable to require a successor to respond to a previously made request to bargain once the bargaining obligation actually arises (Pet. App. A14).[4]

SUMMARY OF ARGUMENT

A. An employer must bargain collectively with a union that represents a majority of its employees in an appropriate bargaining unit. After a union has demonstrated its majority support and been recognized by an employer, it is thereafter presumed to be supported by a majority of the employees unless changed circumstances have clearly eroded the union's support. This presumption of continuing majority support promotes stability in collective bargaining relationships, and hence industrial peace, without unduly restricting employees' rights. In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), this Court held that a change in ownership of the employer does not destroy the presumption of continued majority support for a union if a majority of the employees hired by the new owner had been employed by its predecessor and if there is substantial continuity in the operation of the business.

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[4] Judge Torruella dissented (Pet. App. A17-A30). In his view, petitioner's bargaining obligation could not be determined until it had reached its full complement of employees in April 1983 (*id.* at A21-A25). He also concluded that, on the facts of the case, petitioner was not a successor to Sterlingwale because there was no substantial continuity between the two enterprises (*id.* at A25-A27). Finally, he found that, apart from whether it was reasonable for the Board to have applied a "substantial and representative complement" standard, it was improper to treat the Union's October request for bargaining as a continuing demand (*id.* at A28-A30).

B. The Board correctly concluded that there was substantial continuity in the operation of Sterlingwale's business by petitioner. Petitioner was formed by Sterlingwale's former vice president and a major customer of Sterlingwale, who intended to hire Sterlingwale's employees. They purchased Sterlingwale's real property and equipment and retained most of Sterlingwale's supervisors and job classifications. While petitioner operated as a commission dyer only, that change did not affect the work done by the employees, who by and large performed the same jobs under the same supervision. Under those circumstances it was appropriate to conclude that employee attitudes toward representation should be presumed to remain unchanged.

Petitioner contends that there was no continuity in operations primarily because of the hiatus between the date Sterlingwale laid off most of its employees and the date petitioner commenced operations. While a hiatus is a factor the Board considers in determining whether a successor is required to bargain with the union representing its predecessor's employees, it is not by itself determinative. Here, where there was substantial continuity in operations, the Board properly concluded that the hiatus had not affected the employees' expectation of continued representation by the Union. There is no merit to petitioner's additional contention that it should not be required to bargain with the Union that represented Sterlingwale's employees because it purchased Sterlingwale's property and assets at a foreclosure sale, since that circumstance could not have affected employees' expectations.

C. The Board determines, as of the time that a successor has hired a substantial and representative complement of employees, whether a majority of the employees who have been hired by the successor were formerly employed by its predecessor. That approach appropriately

balances the objective of insuring maximum employee participation in the selection of a bargaining agent and the objective of permitting employees to be represented as quickly as possible. If a full complement of employees will not be hired for some time, then the representation issue is properly resolved at an earlier point, since employees' rights to representation would otherwise be unduly infringed. The Board's rule was properly applied here, since there is no real dispute that a representative complement of employees had been hired by mid-January 1983.

Petitioner and amicus Chamber of Commerce err in suggesting that this Court's decision in *Burns* required the Board to wait until mid-April (seven months after petitioner commenced operations), when petitioner had completed its hiring, to determine whether a majority of petitioner's employees had worked for Sterlingwale. Although the Court stated in *Burns* that in some cases "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain" with the incumbent union (406 U.S. at 295), the Court was distinguishing between cases where a successor takes over its predecessor's ongoing operations and complete workforce and cases where the successor delays hiring decisions until after commencing operations. The Court had no occasion to consider the point in time at which a duty to bargain arises where a successor does not take over an ongoing operation but instead gradually builds up a business after a hiatus in operations.

The contention of petitioner and the Chamber of Commerce that, if a representation question is to be resolved before the successor has hired a full complement of employees, it must be resolved through an election, is wholly illogical. Whether the representation determination is made through an election or through application of successorship principles, the union, if representing a majority of those employed on the date the determination is made, is thereafter entitled to a presumption of majority sup-

port. Employees hired after the date of an election would not be able to participate in the election in any event, although employees can of course cause the union to be decertified if it loses its majority support after that date.

Nor is the Board's rule unfair to employers. An employer can refuse to bargain after a full complement of employees has been hired if it can show that the union has by then lost majority support. Contrary to the claims of petitioner and the Chamber of Commerce, the Board's rule does not unfairly tend to expose employers to charges that they improperly recognized unions lacking majority support. The representative complement rule should not be difficult for employers to apply, and in any event no real penalty attaches in a case where an employer errs in good faith in recognizing and bargaining with a union that is subsequently determined to have lacked majority support.

D. Nor did the Board err in concluding that the Union's demand for recognition in October 1982 was a "continuing demand." In successorship cases an employer is on notice, once a union requests that it bargain, that it will be obliged to bargain if a majority of the employees it has hired at the time that it has hired a substantial and representative complement were employed by its predecessor. The employer can readily determine the facts upon which its bargaining obligation depends without further communication from the union. Moreover, in this case the Union made clear that its bargaining demand was a continuing demand by filing unfair labor practice charges, so there would have been no point in requiring it to formally renew its demand.

E. Successorship cases require the Board to balance conflicting policies in complex situations. The rules the Board has developed are reasonable and consistent with the Act, and the Board's application of its rules to the facts of this case was reasonable: petitioner's facilities, operations, management, and supervisory personnel all demonstrated a substantial continuation of those features of Sterlingwale of direct interest to employees, and at all times from startup through the hiring of a substantial and representative complement of employees a majority of petitioner's employees consisted of former Sterlingwale employees. The one fact to which petitioner can point—the later addition of enough non-Sterlingwale employees to bring the former Sterlingwale employees below a majority—should not deprive the Union of representative status any more than a similar expansion by Sterlingwale would have. The court of appeals therefore properly upheld the Board's decision.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THERE WAS SUBSTANTIAL CONTINUITY BETWEEN THE OPERATIONS OF PETITIONER AND ITS PREDECESSOR AND THAT, HAVING HIRED A SUBSTANTIAL AND REPRESENTATIVE EMPLOYEE COMPLEMENT OF WHICH A MAJORITY WERE FORMER EMPLOYEES OF ITS PREDECESSOR, PETITIONER WAS A SUCCESSOR EMPLOYER OBLIGATED TO RECOGNIZE AND BARGAIN WITH THE UNION THAT HAD REPRESENTED THE PREDECESSOR'S EMPLOYEES

A. Under Settled Principles A New Employer Is A "Successor" Obligated To Bargain With The Union That Had Represented Its Predecessor's Employees Where The New Employer Maintains Continuity In The Operations And Employment Conditions Affecting The Bargaining Unit and Where The Predecessor's Former Employees Constitute A Majority Of The New Employer's Workforce

Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees as defined in Section 9(a), 29 U.S.C. 159(a). Section 9(a) confers exclusive representative status upon a union selected by a majority of the employees in an appro-

priate bargaining unit. A bargaining representative that has demonstrated its majority support in a Board-supervised election, or has been lawfully recognized by an employer on the basis of a showing of majority support, enjoys a presumption of continuing majority status. This presumption is ordinarily irrebuttable for one year following a union's certification or voluntary recognition;[5] thereafter, the presumption can be rebutted by evidence showing that in fact the union has lost its majority status or that objective considerations provide the employer with reasonable grounds for so believing. See *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954); *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951).

The presumption that a union selected by a majority of the employees in an appropriate bargaining unit thereafter continues to enjoy majority support is "designed to promote stability in collective bargaining relationships, without impairing the free choice of employees" in their selection of a bargaining representative. *Terrell Machine Co.*, 173 N.L.R.B 1480, 1480-1481 (1969), enforced, 427 F.2d 1088 (4th Cir.), cert. denied, 398 U.S. 929 (1970). Because the union need not repeatedly demonstrate its majority status, it can concentrate on negotiating a collective bargaining agreement and, after an agreement has been negotiated, on the fair administration of its provisions. In addition, the knowledge that a temporary loss of majority support for the union will not free the employer from its duty to bargain reduces its temptation to seek to undermine union strength rather than to negotiate and administer the collective bargaining agreement in good faith.

[5] However, where a contract has been negotiated, the union's majority status continues immune for the term of the contract from attack either by election or in defense to a refusal to bargain charge, provided that the contract term does not exceed three years. See *General Cable Corp.*, 139 N.L.R.B. 1123 (1962); *Oilfield Maintenance Co.*, 142 N.L.R.B. 1384, 1387 (1963); *Hexton Furniture Co.*, 111 N.L.R.B. 342 (1955).

However, the employer may rebut the presumption and have the representation question redetermined whenever changed circumstances clearly indicate a nontemporary erosion of the union's support. See *Brooks*, 348 U.S. at 100, 103-104.

In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court held that a change in employers does not itself destroy the presumption of continued majority support for an incumbent union where there is continuity in employment conditions and workforce across the change in ownership. Noting that an incumbent union is irrebuttably presumed to have majority support for one year following certification or voluntary recognition and is rebuttably presumed to have majority support thereafter, the Court found that "a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force" of that presumption (*id.* at 279 & n.3). The Court concluded that, where a new employer maintains substantial continuity in the operations of its predecessor's business, so that the "unit appropriate for * * * collective bargaining" under Section 9(a) remains essentially unchanged, and where "a majority of employees after the change of ownership or management were employed by the preceding employer," "there is little basis for faulting * * * implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the [new] employer to bargain with the incumbent union" (406 U.S. at 279, 281).[6]

[6] Although the Court noted in *Burns* that the union had recently been certified as the bargaining representative of the Wackenhut employees who subsequently comprised a majority of Burns' workforce (406 U.S. at 278, 281), the principle enunciated in that case is not limited to that situation, as suggested by amicus Chamber of Commerce (Br. 9, 15, 17). The *Burns* Court cited with approval court of appeals decisions which had found that the presumption of an incumbent union's majority status survived changes in ownership that

The Court's holding in *Burns* that a change of ownership does not destroy an incumbent union's presumption of continued majority support where there is continuity in employment conditions and workforce effectively accommodates the statutory policies in favor of employee free choice and industrial stability. As the Court explained in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973), "[w]hen a new employer * * * has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered."[7] Thus when the new

occurred long after the union's initial certification or recognition as the employees' bargaining representative. See, *e.g.*, *NLRB* v. *Auto Ventshade, Inc.*, 276 F.2d 303, 307 (5th Cir. 1960) (succession occurred seven years after the union had been selected as bargaining representative) (cited in *Burns*, 406 U.S. at 279); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-1027 (7th Cir. 1969) (union had 30-year bargaining relationship with the predecessor prior to the succession) (cited in *Burns*, 406 U.S. at 281). See also *NLRB* v. *Denham*, 469 F.2d 239, 243 (9th Cir. 1972), vacated on other grounds, 411 U.S. 945 (1973) (successor bargaining order enforced where the union had been recognized for 30 years prior to the ownership change); *NLRB* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963, 968 (7th Cir. 1972), vacated on other grounds, 411 U.S. 912 (1973) (14 years); *Zim's Foodliner, Inc.* v. *NLRB*, 495 F.2d 1131, 1134, 1139 (7th Cir.), cert. denied, 419 U.S. 838 (1974) (incumbent union had been recognized for at least eight years prior to the ownership change); *NLRB* v. *Edjo, Inc.*, 631 F.2d 604, 605 (9th Cir. 1980) (four years); *Potter's Drug Enterprises*, 233 N.L.R.B. 15, 16 (1977), enforced, 584 F.2d 980 (9th Cir. 1978) (Table) (10 years).

[7] The Court held in *Golden State* that a new employer who acquired and continued a business with knowledge that its predecessor had unlawfully discharged an employee could be ordered to reinstate the employee with backpay. Failure of the successor to remedy the unfair labor practice, the Court stated, would disappoint the legitimate expectations of employees and lead them to believe that their collective efforts in dealing with their employer were futile. 414 U.S. at 184-185.

employer retains as a majority of its own workforce employees who were represented by the incumbent union, and when they continue work under essentially the same conditions as before, it is reasonable to presume "that the change in ownership has not affected employee attitudes towards union representation" in the bargaining unit as a whole (*NLRB* v. *Jarm Enterprises, Inc.*, 785 F.2d 195, 199 (7th Cir. 1986)), and that the new employer's workforce would "legitimately expect a continuity of bargaining rights" (*International Union of Electrical Workers* v. *NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979)). There is thus no more reason to disturb the incumbent union's presumption of continuing majority status, or to require current proof of its actual majority support, where there is continuity across a change of ownership than there is where the employer remains the same. See *United Food & Commercial Workers Int'l Union* v. *NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985); *NLRB* v. *Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985); Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 Va. L. Rev. 1359, 1395-1396 (1973).[8]

[8] While protecting legitimate employee expectations where there is continuity in employment conditions and workforce across a change of ownership, the Burns successorship principle also duly safeguards " 'the rightful prerogative of owners independently to rearrange their businesses.' " *Golden State Bottling Co.*, 414 U.S. at 182 (quoting *John Wiley & Sons, Inc.* v. *Livington*, 376 U.S. 543, 549 (1964)); see *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 263-264 (1974). For, as the Court held in *Burns*, even where new employers maintain continuity so as to incur a bargaining obligation, they "are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors" unless they agree to be bound, and a new employer also "is ordinarily free to set initial terms on which it will hire the employees of a predecessor" without first bargaining. 406 U.S. at 284, 294. In addition, while holding that a bargaining obligation will attach only where the new employer

The principle underlying the "*Burns* successor" bargaining obligation is analogous to the principle articulated just last Term in *NLRB* v. *Financial Institution Employees, Local 1182*, No. 84-1493 (Feb. 26, 1986), in which the Court held that the Board may not permit an employer to withdraw recognition from a certified union that has undergone affiliation with another union "without determining that the affiliation raises a question of representation" under Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1) (slip op. 9). Noting that " '[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship,' " and that "[i]n many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation," the Court concluded that a "question of representation" is raised under the Act only where reorganization "substantially change[s] a certified union's relationship with the employees it represents" and thereby destroys "continuity of representation." *Id.* at 9, 10 & n.10 (footnote and citation omitted). But, in the absence of a break in continuity, unions remain free to " 'alter their structures and alignments in response to

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chooses to retain its predecessor's employees as a majority of its workforce, the Court made clear that an employer is under no obligation to hire any of the predecessor's employees if it chooses not to, subject only to the requirement of Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), that it not discriminate against the predecessor's employees because of their union membership. 406 U.S. at 280, 282 & n.5. Accord, *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. at 262 & n.8. Properly applied, the *Burns* successorship principle thus "may permit and even facilitate orderly transfers of capital and assets that take due account of appropriate interests of employees and thus by providing transitions with a minimum of disruption may advance the cause of industrial peace." *International Ass'n of Machinists, District Lodge 94* v. *NLRB*, 414 F.2d 1135, 1139 (D.C. Cir. 1969) (Leventhal, J., concurring).

changing economic and political conditions' " without disturbing the presumption that they continue to enjoy majority support among unit employees. *Id.* at 6 n.5 (citation omitted).

The principle applied in *Burns* is also reflected in the Court's decision in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984). There, the Court held that, because "a * * * beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective-bargaining agreement" (*id.* at 528), the debtor-in-possession could, without violating any bargaining obligation under the NLRA, "unilaterally change[] the terms of the collective bargaining agreement between the date of filing the bankruptcy petition and the date on which the Bankruptcy Court authorizes rejection of the agreement" (*id.* at 529 (footnote omitted)). But, the Court also held in *Bildisco* that the filing of a bankrupcty petition does *not* destroy the union's presumed majority status or relieve the debtor-in-possession of its obligation "to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court" (465 U.S. at 534).[9]

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[9] The Chamber of Commerce is wide of the mark in suggesting (Br. 17 n. 13) that the force of the *Burns* decision may have been blunted by the Court's subsequent decision in *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). While the latter decision holds that an employer in an initial recognition situation is free to require that the union establish its majority status in a Board election, nothing in that decision indicates that the Court intended to upset the settled presumption of continued majority status that attaches to an incumbent union that has once demonstrated that it had the support of a majority of the unit employees, or the application of that presumption in a successorship situation. Indeed, in *Bildisco*, decided subsequent to *Linden Lumber*, the Court cited *Burns* in support of its conclusion

B. The Board Properly Found That The Change of Ownership Was Not Accompanied By A Substantial Alteration In The Operations And Employment Conditions Affecting The Bargaining Unit

1. As this Court's successorship decisions make clear, the question whether there is " 'substantial continuity of identity in the business enterprise' " (*Howard Johnson*, 417 U.S. at 263) is a factual question properly focused on whether the employer has "continued, without * * * substantial change, the predecessor's business operations" so that employees who have been retained would reasonably view their employment situations as "essentially unaltered." *Golden State Bottling,* 414 U.S. at 184; see *Burns*, 406 U.S. at 278-280 & n.4. "The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit." *United Food & Commercial Workers* v. *NLRB*, 768 F.2d at 1470.[10]

In making such a determination in a successorship case, the Board considers a number of factors, including the extent to which 1) the same business is being continued; 2) the same plant is used; 3) the same jobs exist under the same working conditions; 4) the same supervisors have been retained; 5) the same machinery, equipment, and methods of production are used; and 6) the same product or service is manufactured or performed. See *Burns*, 406 U.S. at 280 n.4; *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), enforced, 709 F.2d 623 (9th Cir. 1983). The determination is based on the totality of these circumstances, and no one factor is determinative. However, consistent with the proper focus of the inquiry, where the above indicia of continuity are present, changes in the scope or focus of a new employer's business that do not affect the employment relationship or the working conditions of employees will not preclude a finding of successorship. See *NLRB* v. *Jeffries Lithograph Co.*, 752 F.2d at 463, 465-466; *NLRB* v. *Hudson River Aggregates,* 639 F.2d at 869; *International Union of Electrical Workers* v. *NLRB*, 604 F.2d at 694; *NLRB* v. *Band-Age, Inc.*, 534 F.2d at 6.

The record in this case reflects substantial continuity between the old and new employers across the change of ownership. Petitioner was formed, in specific anticipation of Sterlingwale's decision to liquidate its business, by Sterlingwale's former vice president and a major customer of Sterlingwale, for the purpose of continuing the business of textile dyeing and finishing, and specifically to take advantage of Sterlingwale's ready workforce and the facilities and production processes that the workforce had operated for more than 30 years. Petitioner acquired Sterlingwale's real property, all of its machinery, furniture, and fixtures, and a substantial part of its materials and inventory. Although petitioner operated exclusively as a commission dyer and did not perform the converter work previously performed by Sterlingwale, the production process remained the same, and petitioner introduced no new service or product line. Petitioner used the former

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that a debtor-in-possession must bargain with the union representing its employees even though the debtor-in-possession may unilaterally reject the collective bargaining agreement (465 U.S. at 534).

[10] Accord: *NLRB* v. *Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985); *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 627 (9th Cir. 1983); *NLRB* v. *Jarm Enterprises, Inc.*, 785 F.2d at 199; *International Union of Electrical Workers* v. *NLRB*, 604 F.2d at 694, *Saks & Co.* v. *NLRB*, 634 F.2d 681, 687 (2d Cir. 1980); *NLRB* v. *Hudson River Aggregates*, 639 F.2d 865, 869 (2d Cir. 1981); *NLRB* v. *Band-Age, Inc.*, 534 F.2d 1, 4-6 (1st Cir.), cert. denied, 429 U.S. 921 (1976); *Zim's Foodliner, Inc.* v. *NLRB*, 495 F.2d 1131, 1140-1141 (7th Cir. 1974), cert. denied, 419 U.S. 838, *NLRB* v. *Interstate 65 Corp.*, 453 F.2d 269, 273 (6th Cir. 1971); *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970); *NLRB* v. *Armato*, 199 F.2d 800, 803 (7th Cir. 1952).

Sterlingwale machinery and retained most of the same job classifications, and employees performed the same jobs under the same supervision—eight of petitioners' twelve supervisors had been supervisors at Sterlingwale and three of the remaining four supervisors had worked for Sterlingwale—as they had performed while employed by Sterlingwale. See pages 4-6, *supra*.[11]

2. Against the great weight of this evidence establishing continuity in operations and employment conditions, petitioner nonetheless contends that it was operating a fundamentally different enterprise after the takeover and thus was not obliged to recognize and bargain with the Union. Petitioner relies heavily (Br. 16-17, 21-22) on the hiatus between the cessation of production at Sterlingwale and commencement of its own operations to support its contention that there was no substantial continuity between the old and new enterprises. That reliance is misplaced and was properly rejected by the Board and the Court below.[12]

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[11] The Chamber of Commerce contends (Br. 14) that the Board has misapplied the *Burns* rationale by basing "successor bargaining obligations on simple headcounts of the predecessor's employees in the successor's workforce, with no attention to whether there is any factual basis for presuming that those employees desire representation by the predecessor's union," and that it committed that error here (*id.* at 17-18). This contention ignores the Board's finding, which we have shown was fully warranted by the facts here, that petitioner not only hired a workforce of which a majority were former Sterlingwale employees but continued essentially the same business operation.

[12] The operational changes relied on by petitioner (Br. 17-19, 20)—in purchasing, sales, marketing, and financing, all of which related to the change to a pure commission operation—had no significant effect on the continuity of the basic employer-employee relationship or on "employee attitudes toward representation." *NLRB* v. *Jeffries Lithograph Co.*, 752 F.2d at 464; see *NLRB* v. *Interstate 65 Corp.*, 453 F.2d 269, 273 (6th Cir. 1971) (motel's change in banking facilities, record keeping systems, and advertising had no "meaningful" effect on the employer-employee relationship). Similarly, the

It is not unusual in a change of ownership for a break in production to occur while the old employer makes its exit and the new employer surveys its new property and formulates plans for its operation. Although the Board considers the effect of a hiatus between the termination of the predecessor's operations and the commencement of the new employer's operations in determining whether to impose a successor bargaining obligation, such an obligation will be imposed unless the hiatus is " 'one of many factors pointing to such a substantial transformation in the nature of the predecessor's operations' " that employees could not reasonably expect to continue their employment under the same conditions and in the same labor relations environment as under the predecessor. *NLRB* v. *Band-Age, Inc.*, 534 F.2d at 5 (quoting *United Maintenance & Mfg Co.*, 214 N.L.R.B. 529, 532 (1974)).[13] Where it is clear that a hiatus is merely a normal incident

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fact that petitioner did not assume Sterlingwale's corporate liabilities or trade name is of no consequence to the determination whether employees could legitimately expect to continue to have the same bargaining representative. See *NLRB* v. *Band-Age, Inc.*, 534 F.2d 1, 5 (1st Cir. 1976); *Zim's Foodliner, Inc.*, 495 F.2d at 1133-1134; *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-1027 (7th Cir. 1969). Finally, the Board properly concluded that the change from three shifts to two and the reduction in the total number of supervisors represents nothing more than a reduction in the size of the operation, not a fundamental change in the nature of the enterprise sufficient to defeat employees' expectations of continuity in their dealings with their employer. See *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 7-8 (1st Cir. 1978).

[13] See *e.g.*, *Radiant Fashions, Inc.*, 202 N.L.R.B. 938, 940 (1973); *Norton Precision, Inc.*, 199 N.L.R.B. 1003, 1007-1008 (1972); *Gladding Corp.*, 192 N.L.R.B. 200, 210-202 (1972); *Ellary Lace Corp.*, 178 N.L.R.B. 73, 74-78 (1969) (substantial hiatus accompanied by other substantial changes in the operations and direction of the enterprise); *Mondovi Foods Corp.*, 235 N.L.R.B. 1080, 1082 (1978) (lengthy hiatus may diminish employees' expectations of rehire).

of the transfer of ownership, and that the new employer intends to take advantage of the existing operation and workforce, a successor bargaining obligation will be imposed notwithstanding a break in production of several months. See *NLRB* v. *Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975) (bargaining obligation imposed despite hiatus of eight months where other indicia of substantial continuity are present); *C.G. Conn Ltd.*, 197 N.L.R.B., 442, 445-447 (1972), enforced, 474 F.2d 1344 (5th Cir. 1973) (Table) (bargaining obligation imposed despite hiatus of 4½ months).

On the record here it can scarcely be contended that the layoff of employees by Sterlingwale beginning in February 1982 consituted a complete break in their status as employees that would defeat expectations of continued employment or union representation once the operation resumed. Rather, after ceasing production in February, the laid-off workers remained employees of Sterlingwale, and the company assured them of its continuing efforts either to reemploy them or to see that another employer would take over and do so. In addition, Sterlingwale maintained a small crew of employees to ship orders and to keep the plant and equipment in working order. And throughout the period of the layoff the Union met with Sterlingwale officials on a number of occasions to bargain over the effects of the layoff and to offer its assistance in reopening the plant or in finding a new employer to do so. See page 3, *supra*.

Moreover, while the Sterlingwale employees were on layoff status and hoping to return to work in the summer of 1983, petitioner's officers were formulating their plans for the new operation with the specific objective of taking advantage of the Sterlingwale facilities and Sterlingwale's "competent and capable" workforce (J.A. 222, 223).[14]

[14] Thus, contrary to petitioner's suggestion (Br. 17, 22), the fact that petitioner hired former Sterlingwale employees through the newspaper, and not from Sterlingwale directly, is of no moment. For

Petitioner did in fact take over the business for that purpose on August 31; shortly thereafter it began hiring its predecessor's employees and resumed its operations in a substantially unaltered fashion. See pages 5-6, *supra*. Under these circumstances, as the court below found (Pet. App. A8 (footnote omitted)), "[t]he interim period may be viewed as part of 'the normal concomitants of a new management * * *, not a break in the continuity of the employing industry' " (quoting *NLRB* v. *Middleboro Fire Apparatus,* 590 F.2d at 8).

Finally, there is no merit to petitioner's suggestion (Br. 17) that, because technically it purchased Sterlingwale's property and assets at a public foreclosure sale and not directly from Sterlingwale, there was no substantial continuity between the two operations. First, to the extent petitioner suggests that it had no direct commercial relationship with Sterlingwale, that suggestion is belied by the evidence that petitioner was formed by a former Sterlingwale executive and a major customer for the very purpose of taking over Sterlingwale's operation, and that petitioner, albeit through its parent corporation, signed an agreement to purchase Sterlingwale's real property and equipment prior to the foreclosure proceedings.

In any event, because the proper focus of the continuity inquiry is on operations and conditions of employment as they affect employees' legitimate expectations concerning continued representation, the precise form of the corporate transaction by which a new employer succeeds to the workforce and assets of a predecessor is immaterial to that inquiry. Rather, as this Court has made clear, "ordinarily there is no basis for distinguishing" between the

it is clear that petitioner acquired Sterlingwale's assets with the intention of employing a substantial number of its former employees; that it knew of their availability; and that it also knew that they were likely to respond favorably to an offer to return to their old jobs, whatever form the offer took.

various ways in which a transfer of assets may occur, and no requirement of a direct transaction between a successor and predecessor, where the relevant indicia of "continuity in the 'employing industry'" are otherwise present. *Howard Johnson Co.*, 417 U.S. at 257; *Golden State Bottling*, 414 U.S. at 183 n.5; *NLRB* v. *Band-Age, Inc.*, 534 F.2d at 5; Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward A Rational Approach*, 57 Minn. L. Rev. 1051, 1062-1063 (1973).[15] For regardless of the precise nature of the transaction, the new employer has availed itself of a workforce substantially intact from the predecessor and has succeeded to "the tangible or intangible assets by the use of which the employees might have expected the first employer to have performed" its obligations to them. *Burns*, 406 U.S. at 305 (Rehnquist, J., concurring in part and dissenting in part).[16]

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[15] Accord: *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1161 (5th Cir. 1970) (purchases of assets from Chapter XI creditors' committee); *Aircraft Magnesium, A Division of Griso Corp.*, 265 N.L.R.B. 1344, 1346 n.13 (1982), enforced, 730 F.2d 767 (9th Cir. 1984) (Table) (same); *NLRB* v. *Pine Valley Div. of Ethan Allen, Inc.*, 544 F. 2d 742, 743, 744, 745 (4th Cir. 1976) (foreclosure and resale of assets by bank to successor); *NLRB* v. *Hot Bagels & Donuts*, 622 F.2d 1113, 1115-1116 (2d Cir. 1980) (foreclosure and lease of assets by bank to successor); *NLRB* v. *Interstate 65 Corp.*, 453 F.2d 269, 273, 274 (6th Cir. 1971) (reacquisition of assets by foreclosure).

[16] Four Justices dissented from the imposition of a bargaining obligation in *Burns* primarily because, in their view, such an obligation may properly be imposed only where, at a minimum, "the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer." *Burns*, 406 U.S. at 302 (Rehnquist, J., concurring in part and dissenting in part). In *Burns*, the new employer did not succeed to any assets of the prior employer, but rather replaced the predecessor, a direct competitor, as the successful bidder on a service contract. Here, by contrast, petitioner succeeded to virtually all of its predecessor's assets and continued to use them in substantially the same fashion.

C. The Board Properly Determined That The Time At Which Petitioner Had Hired A Representative Complement Of Employees Was The Appropriate Time At Which To Determine Whether The Predecessor's Employees Constituted A Majority Of Petitioner's Workforce

1. a. Once it is found that a new employer is continuing the operations of its predecessor essentially unchanged, the remaining determinant of its obligation to bargain with an incumbent union is whether it has hired the predecessor's employees as a majority of its workforce.[17] In cases such as this one where the workforce grows as the successor moves from startup to regular operation, fixing the appropriate date for determining majority status "involves balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible." *NLRB* v. *Pre-Engineered Building Products, Inc.*, 603 F.2d 134, 136 (10th Cir. 1979) (footnote omitted). Accord, *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 628 (9th Cir. 1983). See also *Hudson River Aggregates, Inc.*, 639 F.2d at 870.

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[17] The *Burns* opinion raises an initial question as to whether the appropriate measure of workforce continuity might not instead be the proportion of the predecessor's employees who were hired by the successor. Compare *Burns*, 406 U.S. at 281 ("a majority of the employees hired by the new employer are represented by a recently certified bargaining agent") with *id.* at 278 ("the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns"). See also *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 263 (1974); *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 n.6 (1973). The Board, upheld by the courts of appeals, has adopted as the appropriate measure of workforce continuity for purposes of a successor bargaining obligation whether the predecessor's employees were a majority of the new workforce, regardless of whether the new employer hired a majority of the predecessor's employees. See *Spruce Up Corp.*, 209 N.L.R.B. 194 196 (1974), enforced per curiam, 90 L.R.R.M. 2525 (4th Cir. 1975); *United Maintenance & Mfg. Co.*, 214 N.L.R.B. 529, 533-534

The need to strike that balance is not peculiar to the successorship situation. The Board balances the same conflicting statutory goals whenever an initial representation election is sought on behalf of an expanding or contracting workforce. Giving weight to the dual needs of "maximum participation" and "immediate representation," the Board holds representation elections in such situations where "the employee complement is 'representative and substantial.' " *Clement-Blythe Companies,* 182 N.L.R.B. 502 (1970), enforced, 77 L.R.R.M. 2373 (4th Cir. 1971). As the Board explained there: "it would unduly frustrate existing employees' choice to delay selection of a bargaining representative for months or years until the very last employee is on board. Conversely, it would be pointless to hold an election for very few employees when in a relatively short period the employee complement is expected to multiply many times." *Ibid.* In determining whether a representative employee complement exists on a given date, the Board does not employ "hard and fast rules." [18] *Ibid.* Rather, it examines such factors as current size of the

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(1974). In the view of the Board, the courts, and commentators, that measure is appropriate because "the basic question to be resolved * * * is simply whether the union represents a majority of the successor's employees." *Boeing Co.* v. *International Ass'n of Machinists,* 504 F.2d 307, 319 (5th Cir. 1974); see *Saks & Co.* v. *NLRB,* 634 F.2d 681, 685-686 & nn.2 & 3 (2d Cir. 1980) (and cases cited therein); Note, *The Bargaining Obligations of Successor Employers,* 88 Harv. L. Rev. 759, 771-774 & 771 n.76 (1975); Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward A Rational Approach,* 57 Minn. L. Rev. 1051, 1054-1055, 1095, 1103 (1973); Goldberg, *The Labor Law Obligations of A Successor Employer,* 63 Nw. U. L. Rev. 735, 793-794 (1969). No issue concerning the propriety of the Board's position in this regard is presented here.

[18] In a related context, involving the circumstances under which its "contract bar" rule will preclude an election where the unit has expanded substantially after the signing of a contract, the Board holds that the "contract will bar an election only if at least 30 percent of the

bargaining unit compared with its full size, whether employees representing the range of required skills and job classifications have been hired, the relative certainty of anticipated changes in size of the bargaining unit, and the time expected to elapse before a substantially larger complement would be hired. *Ibid.*; see also *Evans Products Co.,* 221 N.L.R.B. 1080 (1975); *Witteman Steel Mills, Inc.,* 253 N.L.R.B. 320, 321 (1980).

The Board, with the approval of the courts of appeals, has applied the same "representative complement standard" in cases where a successor has commenced operations with less than a full complement of employees. See, *e.g., NLRB* v. *Jeffries Lithograph Co.,* 752 F.2d 459, 467 (9th Cir. 1985); *Aircraft Magnesium, A Division of Griso Corp.,* 265 N.L.R.B. 1344, 1345 (1982), enforced, 730 F.2d 767 (9th Cir. 1984) (Table); *Hudson River Aggregates, Inc.,* 246 N.L.R.B. 192, 197-198 (1979), enforced, 639 F.2d 865, 870 (2d Cir. 1981); see also *Indianapolis Mack Sales and Service, Inc.,* 272 N.L.R.B. 690, 694-696 (1984), enforcement denied on other grounds, No. 84-3061 (7th Cir. Sept. 25, 1986); *NLRB* v. *Pre-Engineered Building Products, Inc.,* 603 F.2d 134, 136 & n.1 (10th Cir. 1979) (footnote omitted).[19] The Board looks to see whether the job classifications for the operation are "filled

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complement employed at the time of the hearing had been employed at the time the contract was executed, *and* 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed." *General Extrusion Co.,* 121 N.L.R.B. 1165, 1169 (1958). In election cases not involving a contract bar issue, the Board has not applied the strict, mathematical *General Extrusion* formula. *Clement-Blythe,* 182 N.L.R.B. at 502 n.4.

[19] In *NLRB* v. *Pre-Engineered Building Products,* although the predecessor had employed as many as 41 employees, the Board determined that the successor had a duty to bargain based on the fact that the first four employees hired by the successor had been employed by the predecessor (603 F.2d at 136). The court ordered the Board to reopen the hearing to consider the employer's contention that it had "subsequently hired many employees who were not associated with the

or substantially filled" and whether the operation is in "normal or substantially normal production." *Premium Foods, Inc.* v. *NLRB*, 709 F.2d at 628. In addition, the Board considers the relative certainty of any anticipated change in the size of the bargaining unit and the time expected to elapse before a substantially larger complement would be hired. *Indianapolis Mack Sales & Service, Inc.*, 272 N.L.R.B. at 694-695. Where the new employer's plans for expansion are speculative or are dependent on future economic conditions, or where planned changes will not be completed for a number of months, the Board, just as in the initial representation election context, will not delay determining the representation question if an otherwise representative number of employees is on the job. *Id.* at 695. Accord: *NLRB* v. *Jeffries Lithograph Co.*, 752 F.2d at 467-468.

b. Petitioner does not seriously question the reasonableness of the Board's finding that petitioner employed a substantial and representative complement of its workforce in mid-January 1983 or its finding that a majority of its workforce at that time consisted of former Sterlingwale employees. Petitioner had by then hired employees in virtually all job classifications, had hired at least 50 percent of those it would ultimately employ (55 out of 106 to 109 employees), and added no new skills to the workforce thereafter. Of the 55 employees petitioner

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predecessor" (*ibid.*). While the court thus declined to enforce the Board's order and stated that the Board must determine whether the successor employer has a duty to bargain at the point at which it had hired a "full complement" of employees, it acknowledged the necessity of "balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible," and rejected a rigid definition of "full complement" that would unduly postpone the determination of whether a majority of the employees hired by a successor had been represented by its predecessor (*ibid.* (footnote omitted)).

had hired by mid-January, 36 were former Sterlingwale employees (see pages 5-6, *supra*).[20] Petitioner had also reached substantially normal production in mid-January, at which time the first shift was in full operation and petitioner had begun a second shift.[21] Finally, petitioner did not anticipate reaching its total complement until mid-April, three months later and almost seven months after commencing operation in September, and that expansion was contingent on "how business would be" (J.A. 208). In sum, petitioner had reached a substantially normal workforce and level of operation by mid-January and a majority of that workforce was comprised of employees who had

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[20] The Chamber of Commerce errs in contending (Br. 17-18) that it cannot be presumed that any of these employees supported the Union because there is no showing that they had ever expressed their views concerning the Union. This contention, which is similar to an argument made by the dissenters in *Burns* (406 U.S. at 297), was expressly rejected by a majority of the Court in *Burns*. There the Court recognized that, where there is continuity in employment conditions and workforce across a change of ownership, it is proper to apply to the successor employer the same presumption of the union's continued majority status that would have been applied had there been no change of employers. Thus, with respect to a union that has once demonstrated that it is supported by a majority of employees, the presumption that it continues to enjoy that status is not destroyed by changes in the workforce occasioned by normal employee turnover or by the addition of new employees to the bargaining unit. *Lammert Industries* v. *NLRB*, 578 F.2d 1223, 1226 n.6 (7th Cir. 1978); *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 193-195 (8th Cir. 1984); *NLRB* v. *Washington Manor, Inc.*, 519 F.2d 750, 753 (6th Cir. 1975). Accordingly, in *Burns* the Court imposed a successor bargaining obligation despite the lack of mathematical proof that the particular current employees carried over from the predecessor had selected the incumbent union.

[21] The court of appeals noted that petitioner's production process required a two-shift operation (Pet. App. A5). However, the evidence shows that two shifts were required only after a certain production level was reached (J.A. 227) and that expansion of the second shift to full capacity was dependent on the growth of the business (J.A. 208).

been represented by the Union under its predecessor. Petitioner's plans for future growth were somewhat uncertain and, in any event, future growth was not expected for at least two more months. Accordingly, the Board reasonably concluded that petitioner was obligated to recognize and bargain with the Union in mid-January.

There is no merit whatever to petitioner's contention, echoed by the Chamber, that the Board arbitrarily selected the one time Sterlingwale employees constituted a majority of petitioner's employees. Sterlingwale employees had constituted a majority of petitioner's workforce at *all* times from the commencement of its operations through mid-January, expanding from 17 out of 20 to 36 out of 55, and continued to constitute a majority of petitioner's workforce for nearly three months thereafter. The Board measured the bargaining obligation from the earliest point at which petitioner had hired a representative complement of employees. The fact that petitioner ultimately hired additional employees late in March and early in April—and that as a result former Sterlingwale employees for the first time were not a majority of petitioner's workforce—does not make the Board's decision arbitrary or artificial and should no more release petitioner from its bargaining obligation than would a similar expansion have released Sterlingwale from its bargaining obligation.[22]

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[22] In *Burns* the Court found that a bargaining obligation arose following the change of employers, and that the incumbent union thereafter would be presumed to enjoy majority status, notwithstanding the successor's assertion that it no longer employed the predecessor's employees as a majority of its workforce six months after the change in ownership. See *NLRB* v. *Burns International Security Services, Inc.*, 404 U.S. 822 (1971) (granting certiorari to review the question whether a new employer may be ordered to bargain with the union representing the predecessor's employees where "within six months * * * the [predecessor's] employees constitute less than a majority of employees employed at the facility").

2. a. Petitioner (Br. 29-31) and the Chamber (Br. 20-21) contend that this Court's decision in *Burns* mandates that the determination of whether a majority of a successor's workforce was employed by its predecessor must be made only after the new employer has hired its full complement of employees, in this case not until mid-April. In making this contention, they rely on the Court's remark in *Burns* that "[i]n other situations * * * it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit" (406 U.S. at 295). There is no merit to this contention. The Court in *Burns* was considering a situation in which the new employer took over its predecessor's business as an ongoing operation, and it was distinguishing a case where the new employer made all its hiring decisions before commencing operations from a case where hiring decisions were to be made after the new employer commenced operations. The Court had no occasion to consider at precisely what point in a case such as this one, where the successor gradually rebuilt its predecessor's business after a hiatus in operations, it would be appropriate to examine the successor's workforce to determine whether it was required to bargain with the union that represented its predecessor's employees.[23] Accordingly,

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[23] Moreover, the remark on which petitioner and the Chamber of Commerce rely was addressed to the issue of whether the employer in that case had a duty to bargain with the union that represented its predecessor's employees before it set the initial terms on which it would hire employees. The Court had already stated its conclusion (406 U.S. at 277-281) that the employer in *Burns* had violated Section 8(a)(5) by refusing to bargain with the union *after* setting those terms, and it had also concluded (406 U.S. at 281-291) that the employer was not bound by the terms of the collective bargaining agreement that the union had negotiated with the predecessor employer. The Court recognized that, although it had overturned the Board's determination

the statement on which petitioner and the Chamber of Commerce rely cannot properly be construed as mandating postponement of the determination of a successor employer's bargaining obligation until the new business is

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that the new employer was required to make whole its employees for any losses suffered because it had refused to abide by the terms of the collective bargaining agreement, the Board's make-whole remedy might nevertheless be upheld because the new employer had failed to consult with the union before fixing the initial terms on which it would hire employees. The Court did not uphold the make-whole remedy on that theory, concluding instead that "a successor employer is ordinarily free to set [the] initial terms on which it will hire the employees of a predecessor" (*id.* at 294). The Court noted, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms" (*id.* at 294-295). The Court then made the statement on which petitioner and the Chamber of Commerce rely.

In *Pacific Hide & Fur Depot, Inc.* v. *NLRB*, 553 F.2d 609, 613 (1977), the Ninth Circuit recognized that "the 'full complement' statement appears in the part of the *Burns* opinion dealing with a claim that Burns had improperly made unilateral changes in terms of employment (part IV of the opinion, 406 U.S. at 292-96 * * *)," but nevertheless disagreed with an administrative law judge that the remark was limited to that context. However, the court recognized that a "full complement" could be defined "only by considering the facts of each case in light of the general goal which is sought" (*ibid.*). And that circuit has since made clear that in its view the "substantial and representative complement" standard "embodies the balance between early representation and maximum participation that lies at the heart of the 'full complement' concept" of *Burns*. *Premium Foods, Inc.* v. *NLRB*, 709 F.2d at 628 (footnote omitted); *NLRB* v. *Jeffries Lithograph Co., supra*. Thus, as the court below recognized (Pet App. A10), the Ninth Circuit, while insisting that the remark on which petitioner and the Chamber of Commerce rely has relevance beyond cases involving a claim that an employer was required to bargain prior to setting the initial terms on which it hired employees, has nevertheless approved the Board's use of the representative complement standard.

operating at its peak capacity or until the successor employer has hired all of its bargaining unit employees; the courts of appeals have agreed (see page 29, *supra*).

b. Petitioner and the Chamber of Commerce further contend (Pet. Br. 30; Ch. Br. 25-26 & n.18) that making the representation determination without an election after the successor has hired only a substantial and representative complement of employees is unfair to subsequently hired employees and is also unfair to the new employer. This contention does not withstand analysis.

The Board's rule is not unfair to employees hired after a substantial and representative complement has been hired and the representation determination has been made. Petitioner (Br. 29) and the Chamber (Br. 26-27) both concede that it would be appropriate to hold a representation *election* among the employees of a successor once a substantial and representative complement has been hired. It is difficult to understand why a representation determination is any more or less fair to subsequently hired employees depending on whether the determination (in which they do not participate in any event) is made through an election, through voluntary recognition, or in unfair labor practice proceedings. Nor is there any reason why the use of the representative complement standard should be permissible in a case involving an election or a voluntary recognition, but not permissible for resolving a refusal to bargain charge.

It is well settled that, where the majority status of a bargaining agent has been properly determined, the mere fact that the unit thereafter expands, so that the employees who initially selected the union may no longer constitute a majority, does not in itself provide grounds for redetermining the existence of majority support. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 702-704 (1944). Accordingly, if an election had been held on January 15, 1983, when petitioner had hired a substantial and repre-

sentative complement of employees, and as a result the Union had been certified as the majority representative, it would be irrelevant that some three months later the predecessor's employees were for the first time less than a majority. There is no good reason to apply a different principle where the Union's majority status was determined by application of the presumption to which an incumbent union is properly entitled.

Enforcement of the Board's order does not by any means irrevocably lock the employees into representation by the Union. As the Court has observed, "[t]here is, after all, nothing permanent [about] a bargaining order * * *." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969). Once the Union has had a reasonable opportunity to represent the employees free of the effects of petitioner's unlawful failure to bargain, the employees may take appropriate action to reject the Union. *Ibid.*; Bishop v. *NLRB*, 502 F.2d 1024, 1029 (5th Cir. 1974). See also *Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985) (footnote omitted) (with respect to an incumbent union that had been recognized by a predecessor employer for a year or more, the successor was free to discontinue recognition "at any time following recognition if it [could] show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support"). Accordingly, had petitioner recognized the Union after it had hired a substantial and representative complement of employees, it would have been entitled, absent a contract, to withdraw that recognition if presented with evidence creating a good faith doubt that a majority of its workforce wanted to be represented by the Union. Similarly, in those circumstances, the employees

would have been entitled to file a petition for an election to decertify the Union. See *NLRB* v. *Financial Institution Employees,* slip op. 5.

The Chamber asserts (Br. 24) that it makes "little practical sense" to require a successor to commence bargaining based on the incumbent union's majority status in a representative complement when the employer is free to subsequently withdraw recognition should the full complement not in fact desire union representation. What the Chamber ignores is that the delay in according employees who desire union representation that right "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros.*, 321 U.S. at 704. Here, for example, the petitions allegedly forswearing support of the Union, on which petitioner and the Chamber rely, were motivated in part by the employees' concern that the pendency of the instant unfair labor practice proceeding would delay an expected wage increase.[24]

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[24] Petitioner (Br. 25) and the Chamber (Br. 6-7 nn. 7, 8, 22) suggest that two petitions withdrawing support for the Union signed by a number of employes on April 29, 1983, three days before the unfair labor practice hearing commenced, demonstrate the inequity of the Board's position. The Board, upheld by the court of appeals (Pet. App. A15), refused to consider those petitions in determining whether petitioner was a successor employer, explaining that petitioner could not, in defending against its refusal to bargain in mid-January, rely on events in mid-April. *Terrell Machine Co.* v. *NLRB,* 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 398 U.S. 929 (1970); *NLRB* v. *Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966). See also *Franks Bros. Co.* v. *NLRB, supra.* Accordingly, the authenticity of the petitions has not been determined and hence there is no credited evidence on this record that the employees in April no longer supported the Union. Moreover, it is clear that the petitions were prompted, at least in part, by the employees' concern that the Board proceeding would delay a wage increase. Employee Norman Rego, who had been secretary of the Union at the time Sterlingwale suspended operations (J.A. 179), testified that, after a meeting with Vice President Chace, he told the other employees that "it's going to take until May 2 [the

Had petitioner bargained with the Union in January, when a representative complement of employees had been hired, the employees' concern over wages might have been addressed by April and the employees might not have signed the petitions.[25]

Petitioner (Br. 32) and the Chamber of Commerce (Br. 24) further contend that fairness to the employer dictates that a representation election be utilized to determine majority status if that determination is to be made based on a substantial and representative, rather than a full, complement of employees. Specifically, the Chamber asserts (Br. 24) that, since the Board "has established no hard and fast rules for determining when an employer has hired a representative complement of employees," an employer runs the risk of violating Section 8(a)(5) if it withholds recognition after a representative complement has been hired,

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date of the hearing] till we find out if we're going to get a raise or not" (J.A. 173). He also testified (J.A. 194-195) that, when they asked him to draw up the petitions, the employees were "upset" over the possibility of missing a raise and that they thought the unfair labor practice hearing might be blocking it. Rego testified to his own impression that, with appeals by the losing party, "this could go on for three years" and he stated that "the guys think they're not going to get a raise for three years" (J.A. 183). Thus, rather than demonstrating that the employees did not want to be represented by the Union, the petitions instead merely show that the employees thought that they had to disavow support for the Union to get a raise.

[25] In another offer of proof, petitioner asserted that Chace would testify that, when the Company resumed operations at the plant in September 1982, "a number of employees" had indicated to him that they were "extremely displeased" with the Union and wanted nothing to do with it (J.A. 233-234). This offer was properly rejected by the Board since there was no indication of the number of employees making such statements to Chace, and petitioner never asserted that it possessed a good faith doubt of union majority on January 15, 1983, when the Board found that a representative complement had been hired.

and it risks violating Section 8(a)(2), 29 U.S.C. 158(a)(2), if it recognizes an incumbent union before having hired a representative complement.[26]

However, while the determination of whether the employer has hired a "representative complement" of employees turns on the facts of each case, the criteria for making that determination are fairly clear and can readily be applied by the employer, who is in the best position to know the facts relating to its future business expansion and hiring plans. Thus in most cases it should not be difficult for an employer to determine when a representative complement of employees has been hired. Moreover, "full complement" is not a concept that is inherently any more susceptible to precise calculation than is "representative complement." Where (as here) continuing expansion is related to economic factors such as demand or accessibility of capital, it is plainly not possible to determine with absolute certainty when a full complement of employees has been hired. Thus, even under a "full complement" standard an employer would run some risk that the Board would find that it had recognized a union too early, or had failed to recognize it when it was required to do so, and waiting for a "full complement" could mean an indefinite wait.

But even if the Chamber of Commerce and petitioner were correct in their assertion that the Board's representative complement rule exposes employers to some risk of

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[26] Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "contribute * * * support" to a labor organization. It is settled that an employer's grant of initial recognition to a union representing only a minority of employees constitutes unlawful support under Section 8(a)(2) "because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.'" *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 738 (1961) (quoting *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)).

charges that they had violated Section 8(a)(2) of the Act,[27] a successor employer that violates Section 8(a)(2) in good faith is subject only to a remedial order. No serious penalty would result if an employer determined that it had hired a representative complement of employees and bargained with the union that previously represented them, if it were subsequently determined that in fact the employer had not yet hired a representative complement of employees.[28]

D. The Union's Bargaining Request Constituted A Continuing Demand, Which Petitioner Violated By Persisting In Its Refusal To Bargain

It is not uncommon in successorship cases for the union's bargaining demand to be made before it is clear that a bargaining obligation has arisen. The realities of business transfers are such that unions often lack precise

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[27] We are not aware of any case in which the Board has found a Section 8(a)(2) violation where a successor employer recognized an incumbent union before a representative complement of employees had been hired. In such a situation, the concerns underlying Section 8(a)(2)—that an employer not give assistance to a theretofore unrecognized union that has not in fact demonstrated its support among unit employees—appear to be absent. See *Colonial Haven Nursing Home,* 218 N.L.R.B. 1007, 1010 (1975); *Anaconda Co.,* 225 N.L.R.B. 953, 954-956 (1976).

[28] As the Court stated in *International Ladies' Garment Workers' Union,* 366 U.S. at 740 (footnote omitted), in upholding the finding of a Section 8(a)(2) violation where the parties, in good faith, guessed wrong as to the union's majority status:

> [N]o penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding. If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. No further penalty results.

information about whether and when a change in ownership is to take place and what plans the new owners have for the enterprise. Accordingly, in such cases, when an incumbent union makes a clear request for bargaining in an appropriate unit, the Board generally treats the demand as continuing until such time as the employer has reached a sufficient employee complement to resolve the representation issue, and does not require the union to renew its request at that time. See, *e.g., Aircraft Magnesium,* 265 N.L.R.B. at 1345; *Hudson River Aggregates,* 639 F.2d at 868, 870; *Saks & Co.* v. *NLRB,* 634 F.2d at 684-685; *Tom-A-Hawk Transit, Inc.* v. *NLRB,* 419 F.2d 1025, 1026 (7th Cir. 1969); *United Maintenance & Mfg. Co.,* 214 N.L.R.B. at 530, 534; *Spruce Up Corp.,* 209 N.L.R.B. at 194, 196, 197-198.

Contrary to the contention of petitioner (Br. 31-35) and the Chamber of Commerce (Br. 24-25), the Board's "continuing demand" principle does not create an unacceptable uncertainty and unfairness for the successor employer. Regardless of the timing of the union's demand, the employer is on notice that it will be obliged to bargain if a majority of the employees it hired were employed by its predecessor. Moreover, whereas the union may not know the employer's precise plans before making a bargaining demand, the employer can readily determine, without further communication from the union, the facts on which its bargaining obligation is dependent—*i.e.,* whether a majority of the workforce came from the predecessor at the time that the job classifications for the operation were "filled or substantially filled" and the operation was "in normal or substantially normal production." *Premium Foods, Inc.* v. *NLRB,* 709 F.2d at 628. See also *Hayes Coal Co.,* 197 N.L.R.B. 1162, 1163 (1972).[29]

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[29] The reliance of petitioner and the Chamber on *Hedstrom Co.* v. *NLRB (Hedstrom I),* 558 F.3d 1137, 1146-1148 (3d Cir. 1977), on reh'g en banc, 629 F.2d 305 (1980), cert. denied, 450 U.S. 996 (1981),

Moreover, on the facts in this case, there was no practical reason for the Union to renew its bargaining request after it was first made. After petitioner rejected the Union's October 1982 demand—with no suggestion that it might later change its mind—the Union made clear that it still sought recognition by filing an unfair labor practice charge on November 1. See *Enterprise Products Co.*, 265 N.L.R.B. 544, 563 (1982) ("[t]he Union's actions in diligently pursuing the representation proceeding and in pressing the unfair labor practice charges establish its demand as a continuing one") (footnote omitted). Furthermore, in its answer to the unfair labor practice complaint,

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is misplaced. In *Hedstrom,* the court rejected the continuing demand concept only in an initial recognition context where the obligation to recognize the union is dependent upon its showing of majority support and the employer is ordinarily entitled to insist on an election. In that situation, it is the union, not the employer, that is in the best position to know the facts that trigger the bargaining obligation.

Moreover, since the panel decision in *Hedstrom I,* the Third Circuit has made clear that use of the continuing demand rule may be appropriate in certain circumstances even in an initial recognition context. In *Hedstrom I,* the panel had denied enforcement to a "*Gissel*" bargaining order (see *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969))—*i.e.*, the Board found that the employer's unfair labor practices had seriously impaired the electoral process and dissipated the union's majority—where the Board had imposed a bargaining obligation as of the date the union attained a card majority, even though the union's request to bargain preceded that majority date and was not renewed. Following a remand to the Board, the Third Circuit, sitting en banc, ultimately enforced the Board's order and held that in circumstances in which an election is not appropriate because of an employer's unfair labor practices and in which the union has otherwise demonstrated its majority status, the Board may impose a bargaining obligation from the date the majority was achieved and the unfair labor practices began, whether or not at that time the union had made a demand for bargaining. *Hedstrom Co.* v. *NLRB (Hedstrom II),* 629 F.2d 305, 318-319 (3d Cir. 1980) (en banc), cert. denied, 450 U.S. 996 (1981). Accord: *NLRB* v. *Daybreak Lodge Nursing & Convalescent Home, Inc.*, 585 F.2d 79, 82-83 (3d Cir. 1978); *NLRB* v. *Eagle Material Handling, Inc.*, 558 F.2d 160, 170 (3d Cir. 1977).

petitioner admitted that on October 21 (when it formally rejected the Union's demand) "*and at all times thereafter,*" it "did refuse and *continues to refuse*" to bargain with the Union (J.A. 6, 11) (emphasis added). It is thus unmistakably clear that the Union's repetition of its initial bargaining request would have been futile; a renewal demand should therefore not be deemed necessary to the finding of the violation here.[30]

E. The Board's Decision Is A Reasonable Application Of Successorship Principles To The Facts Of This Case And Is Entitled To Deference

In this case, as in many others, " '[t]he ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' " *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483,

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[30] There is no merit to petitioner's suggestion (Br. 32-33) that it was improper for the Board to find an unlawful refusal to bargain as of January 1983, even though the unfair labor practice complaint was issued prior to that time, on December 21. It is well settled that "administrative * * * adjudication may be based on facts arising subsequent, as well as prior, to the filing of th[e]" complaint, so long as the responding party is on notice at the hearing of the allegations against it and is not prejudiced in its ability to litigate those allegations. *Curtiss-Wright Corp., Wright Aero Div.* v. *NLRB,* 347 F.2d 63, 73 (3d Cir. 1965). Accord: *American Newspaper Publishing Ass'n* v. *NLRB,* 193 F.2d 782, 800 (7th Cir. 1951). Petitioner does not contend that it was not on notice in the unfair labor practice proceeding of the General Counsel's theory that it violated the Act by refusing to recognize and bargain with the Union once it was clear that it was employing a predecessor majority in a substantial and representative employee complement. Moreover, the Board's order requires only that petitioner recognize and bargain with the Union, and imposes no obligation on petitioner with respect to its conduct prior to the time the bargaining obligation actually arose.

501 (1978), quoting *NLRB* v. *Truck Drivers,* 353 U.S. 87, 96 (1957). As the court of appeals recognized, " 'The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if [it] satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.' " Pet. App. A15 n.44 (quoting *Beth Israel Hospital,* 437 U.S. at 501).[31] This Court has made clear that these principles apply in successorship cases no less than in other areas under the Act. *Golden State Bottling,* 414 U.S. at 181.[32] The Board's decision here is not "irrational or inconsistent with the Act" (*NLRB* v. *Financial Institution Employees,* slip op. 9), and thus is entitled to deference.

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[31] In *NLRB* v. *Financial Institution Employees* the Court, while overturning the Board's rule that nonunion employees must be allowed to vote in elections determining the affiliation of a local union before it would order an employer to bargain with a union that had changed its affiliation, reiterated that it "deferred to Board decisions that are not irrational or inconsistent with the Act" (slip op. 9). The Court concluded that the Board's rule was inconsistent with the decertification procedures and the election procedures established by the Act (*id.* at 11), and noted that it therefore did not have to address the issue whether the Board's rule was irrational (*id.* at 17 n.13).

[32] Petitioner erroneously suggests (Br. 15) that the Board's factual analysis in successorship cases is entitled to less deference on appellate review than are its fact findings in other types of cases. As the case that petitioner cites makes clear, in the successorship context no less than in other areas the responsibility of applying broad legal principles to particular cases is "committed primarily to the Board," and the Board's decisions in successorship cases are entitled to deference as long as they are compatible with "the spirit as well as the language" of the Court's decision in *Burns. International Ass'n of Machinists* v. *NLRB,* 595 F.2d 664, 673 n.41 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979).

The Board's rule that a change in ownership of a company does not destroy the presumption of continued majority support for a union, if there is a substantial continuity in the operation of the predecessor's business and a majority of those hired by the successor employer worked for its predecessor, is a reasonable rule that is neither inconsistent with the Act nor irrational, as this Court held in *Burns.* The Board's determination in this case that there was substantial continuity in the operation of the business is amply supported by the evidence in the record.

Similarly, the Board's determination that a successor employer has a duty to bargain, at the time that it has hired a substantial and representative complement of employees, if a majority of the employees hired at that point had been employed by the predecessor, is a rule that balances conflicting legitimate interests in a manner within the Board's province. Petitioner and the Chamber of Commerce contend that if the representation issue is resolved when a representative complement of employees has been hired it must be resolved through an election, but their proposal, which ignores the fact that the union in such a situation has already demonstrated its majority support and is entitled to a presumption of continued support, is not entitled to this Court's deference: The task of developing rules that balance the conflicting concerns of national labor policy is one " 'which the Congress committed primarily to the National Labor Relations Board.' " *Golden State Bottling,* 414 U.S. at 181. The Board's rule is not inconsistent with the Act, since no statutory provision mandates that the Board either hold an election or wait until a full complement of employees has been hired before determining the representation question. And the Board's rule is hardly irrational, as it gives force to the presumption of continuing majority support to which a union is entitled and avoids unduly delaying the employees' right to representation. Accordingly, the court

of appeals correctly upheld the representative complement rule. There is little question that the Board correctly applied its representative complement rule to the facts of this case, since it is clear that a representative complement of employees had been hired by petitioner in mid-January of 1983.

Finally, the Board's rule that a union's demand to bargain may be deemed a continuing demand is a rational rule that is not inconsistent with the Act. The court of appeals correctly concluded (Pet. App. A15), citing *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 413 (1982), that even if the continuing demand rule is "not one that we would ourselves devise," it is not " 'arbitrary or contrary to law.' " It is clear that substantial evidence supports the application of the continuing demand rule here since the Union pressed unfair labor practices charges promptly once petitioner refused to bargain with it, so that petitioner cannot reasonably argue that it was unaware that the Union continued to demand that petitioner bargain with it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FALL RIVER DYEING & FINISHING CORP.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The facts of this case are accurately stated in petitioner's Brief on the Merits. The facts stated and argued by the Board in its Brief on the Merits have in many instances either no basis in the record or are grounded upon unsupported presumptions or assumptions. These distortions are necessary predicates to support the Board's contentions regarding major issues. Those issues include: 1) whether there has been a sufficient continuity between the dismembered and moribund business of Sterlingwale, and the new business of petitioner Fall River to warrant a finding of successorship and an imposition of an order requiring Fall River recognize and bargain with the Union which formerly represented the employees at Sterlingwale and, 2) the cause and effects of the lengthy hiatus between the cessation of production at Sterlingwale and the commencement of production and hiring of employees by Fall River.

Because this Court has recognized that each successorship case is fact specific, it is necessary to point out where the Board has misstated or misinterpreted the facts in its attempts to create a greater degree of continuity than actually existed and to minimize or negate the cause and effects of the lengthy hiatus.

The following citation abbreviations are used here:
"A" refers to the Appendix to the Petition For a Writ of Certiorari.
"JA" refers to the Joint Appendix
"Bd. Br." refers to Respondent National Labor Relations Board's brief on the merits.

THE BOARD HAS STATED FACTS AND SET FORTH ARGUMENTS IN ITS BRIEF TO SUPPORT ITS CONTENTIONS REGARDING CONTINUITY OF EMPLOYING ENTERPRISE AND THE CAUSE AND EFFECTS OF THE HIATUS WHICH ARE NOT SUPPORTED BY THE RECORD OR ARE BASED ON UNSUPPORTED PRESUMPTIONS OR ASSUMPTIONS.

A. THE COLLECTIVE BARGAINING AGREEMENT HAD EXPIRED AND THERE WERE NO EFFORTS MADE BY THE UNION TO NEGOTIATE A NEW CONTRACT

The collective bargaining agreement between the Union and Sterlingwale formed the basis for the Board's Complaint against petitioner (JA 6-7) and lies at the heart of the presumption of continuing majority status, necessary to impose a bargaining order. *Celanese Corp. of America*, 95 NLRB 664 (1951), *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The Board did not mention that the collective bargaining agreement (G.C. Exhibits 11 and 13, JA 317-50 and 353-5), which was in effect at the time of the lay-off on February 12, 1982, expired on April 1, 1982 (Bd. Br. 3). The Board stated at page 2 of its Brief in Opposition to the Petition for Certiorari that "The parties last collective bargaining agreement extended to 4/1/82."[1] The court below found the contract expired in April 1982 without further extension by the parties (A-18). The Administrative Law Judge stated that the collective bargaining agreement was extended to 4/1/81 [sic] (A-36).[2] The failure

[1] In its Brief on the Merits the Board states only that the Union agreed in Oct. 1980 to extend the collective bargaining agreement. (Bd. Br.2)

[2] Lenihan, the International Union Representative did testify however that he told Ansin, Sterlingwale's President on July 12, 1982, just prior to the public auction that "we had a contract". (JA 67). It is not clear from this whether Lenihan was referring to the expired contract for effects bargaining purposes

(Footnote continued)

to attempt to negotiate a new agreement during the hiatus is indicitive of a lack of continutity of the employing enterprise.

B. THERE WAS NO REASONABLE BASIS FOR AN EXPECTATION OF REHIRE BY STERLINGWALE EMPLOYEES

The Board attempts to create an expectation by laid off employees that during the lengthy hiatus Sterlingwale would either be resurrected, resulting in their rehire, or they would be rehired by a new employer (Bd. Br. page 3). Although Ansin made some general statements to the effect that he was searching for a partner to make a financial infusion into Sterlingwale, (JA 146), at the time he said this he had been in the

(Footnote continued)

or whether he claimed it was still in effect. Ansin, did not recall whether Sterlingwale forwarded any dues to the Union for work done by any Union member after February 12, 1982 (JA 148). In any event, it is clear that the last negotiations between the Union and Sterlingwale for a new contract were on December 23, 1981 (JA 65) and that thereafter the meetings between the Union and management dealt with Union members' benefit claims under the expired collective bargaining agreement regarding insurance, vacation and severance pay (JA 66, 78, 82). Sterlingwale had refused to pay medical and life insurance premiums (JA 84) for January 1982 when approximately 150 production employees were working for the Company. Sterlingwale subsequently did not pay any premiums due for February and March 1982 (JA 78-9), although Ansin subsequently conducted an orderly liquidation of assets between the time of the lay-off and the time of the assignment for the benefit of creditors, with the approval of creditors, to pay taxes and liabilities (JA 114, 146). Insurance premiums were not paid, nor were vacation or severance benefits paid. Bargaining unit employees who wished to have coverage had to pay premiums from their own pockets (JA 78-81). The Union grieved the severance and vacation pay defaults but the Company refused to discuss them (JA 82) and the Union did not proceed to arbitration (JA 83). The Union's failure to obtain these contractual benefits for the laid off employees was the principal reason for the subsequent repudiation of the Union as a continuing bargaining representative by the employees of petitioner, according to the testimony of the Union's Secretary, Rego (JA 164, 168, 172, 475). "...they said because they didn't get their vacation pays, they don't want the Union back. And that's the God's-honest truth". (JA 164)

process of conducting an orderly liquidation of certain of the assets of Sterlingwale (JA 114, 146, 147). By June or July of 1982, any hopes of resurrection of Sterlingwale ended when Ansin told the Union that he had found a potential partner, "But for reasons beyond our control, there were parties outside my sphere of control that wouldn't allow it to happen." (JA 147). While the Union did offer to meet with any prospective buyers, (JA 68) nothing ever came of this offer (JA 68). Despite the Board's contention (Bd. Br. 3) that the Union offered to keep the plant operating, the record shows that the Union officer merely said "...we were concerned about the plant operating..." (JA 68), and did not offer any concessions to any new operator.[3]

Despite the Board's assertion (Bd. Br. 3) that by July or August 1982 Sterlingwale decided to go out of business, the record shows that commencing with the lay-off in February of 1982 Ansin was liquidating Sterlingwale for the benefit of creditors (JA 114). The decision was not first made in July or August 1982 when Sterlingwale executed an assignment of its remaining assets for the benefit of creditors, but it was made in February of 1982 or earlier.[4]

[3] There is no evidence in the record that any of the discussions between the Union and Ansin concerning the possible resurrection of Sterlingwale, or the continuity of its business through any prospective purchaser, were ever communicated to any of the laid off employees of Sterlingwale. It is therefore difficult to perceive of any laid-off employee having a rational basis for any expectation of rehire by Sterlingwale, let alone by an assets purchaser who did not appear until 7 months after the layoff. The Board's statement (Bd. Br. 24) that Sterlingwale employees were hoping to return to work in the summer of 1983 is speculation, unsupported in the record, designed to minimize the effect of the lengthy hiatus.

[4] Ansin testified that he had an outside accountant come in to make an analysis of the Company if it were run strictly as a commission finisher and the accountant concluded that even if Sterlingwale had gone through a bankruptcy, the Bankruptcy Court would not allow Sterlingwale to maintain the business as such (JA 131-2).

C. STERLINGWALE'S DECISION TO GO OUT OF BUSINESS AND PETITIONER'S DECISION TO ATTEMPT TO ACQUIRE THE PLANT AND EQUIPMENT FORMERLY BELONGING TO STERLINGWALE WERE NOT CONTEMPORANEOUS EVENTS

The Board attempts to foster the appearance of substantial continuity of the employing enterprise by creating the impression that Sterlingwale's decision to go out of business was contemporaneous with the decision of petitioner to acquire some of the assets and inventory which formerly belonged to Sterlingwale (Bd. Br. 3-4). This time sequence is not supported by the record. Liquidation of Sterlingwale began in February of 1982. There was absolutely no dealings between Fall River or its parent, Marcamy Sales Corp., or Arthur Friedman, its principal, with Sterlingwale. The genesis of Fall River was that Arthur Friedman was approached by the machinery dealer and a lawyer who apparently either held or represented the persons who held the security interests on the equipment, land and buildings. (JA 204) Friedman had contact then with Chace,[5] a former officer of Sterlingwale who at that time was employed in New York City by a competitor of Sterlingwale (JA 191). Chace, who had been the Vice President of Sterlingwale and whose duties involved sales primarily (JA 189) and some plant operation (JA 189) left Sterlingwale at the end of February 1982. According to its Articles of Incorporation (JA 273) Fall River was not formed until August 31, 1982. Chace is Vice President of Fall River but is not a shareholder (JA 199).

Chace did not, as claimed by the Board (Bd. Bd. 6) continue to be in charge of plant operations and involved in labor

[5] The Board claims (Bd. Br. p. 4 ff 1) that Chace participated in collective bargaining with the Union and in handling employee grievances during his tenure at Sterlingwale. The record shows that Chace was not so involved in 1981 and 1982 (JA 189). Chace testified he was basically involved in sales for Sterlingwale (JA 232). Alfred Canuel was the plant manager of Sterlingwale (JA 232). He was not rehired as such by petitioner and Chace became petitioner's plant manager, commencing in the mid-part of September 1982 (JA 191).

relations as he had been with Sterlingwale. Sterlingwale's plant manager was Alfred Canuel (JA 232). Chace was basically involved in sales (JA 232) and in 1981 and 1982 Chace was not involved in plant operations (JA 189). The record shows that the collective bargaining and grievance machinery were handled by Ansin and Canuel for Sterlingwale, in 1981 and 1982 (JA 189-90). The Board's Brief attempts to create the appearance that there was a continuity in these functions at petitioner through Chace.

D. THE EXISTENCE OF STERLINGWALE'S EMPLOYEES DID NOT MOTIVATE PETITIONER TO ATTEMPT TO PURCHASE ASSETS FORMERLY OWNED BY STERLINGWALE

The Board states (Bd. Br. 4) that petitioner was interested in acquiring Sterlingwale's facilities specifically because of the known availability of a "competent and capable" workforce.[6] The quoted language is taken out of context.[7] The Board's statement (Bd. Br. 4) that there was a "known availability of a competent and capable workforce" is sheer speculation, completely unsupported by any evidence in the record. It could as

[6] It has been suggested that if a new employer enjoys substantial benefits from continuity, exclusive of the work force, this should be considered in determining the obligations imposed upon the new employer. Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accomodating Wiley and Burns*, 59 Va. L. Rev. 1359, 1395.

[7] Chace was asked: "Why did you open this operation in Fall River? (JA 204) His response was, "Because of the workforce; there was good, competent and capable people." It is clear that Chace was not interested in acquiring *Sterlingwale's facilities* to obtain a competent and capable workforce but wished to locate in that *area* because of the workforce. Chace testified that what he was really looking for was experienced people (JA 223), and that he did not limit his consideration to Sterlingwale but that he considered experience with other finishing plants also (JA 223). The hiring criteria were the matching of skills in the applicant pool to the petitioner's needs (JA 223-4), and petitioner did not hire all former employees of Sterlingwale who applied for jobs with petitioner. (JA 223-224)

easily have been speculated that in the seven months before petitioner hired its first employee, that large numbers of Sterlingwale employees had found either permanent employment elsewhere or had left the vicinity of Fall River, Massachusetts.

The Board claims that petitioner "...intended to hire Sterlingwale's employees." (Bd. Br. 10) This contention is not supported by the record. The record shows that petitioner made no attempt to obtain employee lists or personnel records from Sterlingwale or to contact any of the former Sterlingwale bargaining unit employees directly. Petitioner's employment efforts were restricted to running an advertisement in a local newspaper (JA 198), to which some Sterlingwale employees responded as well as employees or former employees of other employees (JA 223-224).

The Board urges (Bd. Br. 24-25 ff14) that petitioner acquired Sterlingwale's assets with the intention of employing a substantial number of its former employees; that it knew of their availability; and that it also knew that they were likely to respond favorably to an offer to return to their old jobs, whatever form the offer took. All of this is complete speculation and conjecture on the part of the Board. There is nothing in the record to support any of these assertions which are made to attempt to create the appearance of a continuity of employing enterprise between Sterlingwale and Fall River.

Although the Board contends that the employees by and large performed under the same supervision, Sterlingwale operated with 18 supervisors while petitioner employs but 12, of whom 8 were formerly employed by Sterlingwale (JA 196). There is no evidence in the record that any former Sterlingwale supervisors were "retained" by petitioner.[8]

[8] The significance of any carry over of supervisors is its presumed support of the presumption that attitudes of the employees towards their former Union representation will remain unchanged. This factor is entitled to no significance here where the record contains evidence that a majority of the former

(Footnote continued)

The Board also states (Bd. Br. 4) that petitioner acquired a substantial amount of Sterlingwale's inventory and raw materials from a professional liquidator that Sterlingwale had employed to sell its assets. The record shows that Sterlingwale purchased about $13,000 worth of items out of about $30,000 total received from the sale (G.C. Exhibit 7, JA 290-291, 202).[9]

E. THE RECOGNITION DEMAND DID NOT CLAIM THAT THE UNION REPRESENTED A MAJORITY OF PETITIONER'S EMPLOYEES

The Board states that on October 19, 1982 the Union requested that petitioner recognize it (Bd. Br. 5). The Union's only recognition demand was expressly premised on the successors and assigns provision in the collective bargaining agreement with Sterlingwale which had expired on April 1, 1982 and which had not been renewed (G.C. Exhibit 15) (JA 360-361). Neither in its October 19, 1982 bargaining demand nor at any time thereafter, did the Union ever claim that it represented a majority of the employees employed by petitioner.

F. NO VALID PRESUMPTION OF CONTINUITY OF EMPLOYING ENTERPRISE ARISES FROM THE FACT THAT PETITIONER DOES BUSINESS WITH FORMER CUSTOMERS OF STERLINGWALE

The Board stressed that over half the dollar volume of petitioner's business came from former Sterlingwale customer's (Bd.

(Footnote continued)

Sterlingwale employees repudiated the Union because of its failure to obtain the benefits due the Sterlingwale employees.

[9] It should also be noted that a major component of this inventory was greige goods and chemicals which petitioner used solely for experimental production purposes to insure that the production machinery was running properly, so that its finishing customer's goods would not be subject to damage. Sterlingwale, of course, sold finished goods for its own account as a converter (JA 149).

Br. 6). This statement is misleading for two reasons. First, petitioner never purchased Sterlingwale's customers list, nor did Sterlingwale make or attempt to make any transfer of its customers to petitioner. Sterlingwale had in fact not engaged in production for any of its former customers for at least seven months before petitioner hired its first employees. Second, petitioner had to compete in the open market for any finishing customers it obtained. There is no rational basis for the Board's underlying presumption that finishing customers of Sterlingwale would become customers of a new, unrelated business, Fall River Finishing & Dyeing. Corp.

G. PETITIONER'S WORKFORCE DID NOT GROW UNEXPECTEDLY TO 105 IN LATE MARCH OR EARLY APRIL

The Board, in an attempt to rationalize the application of its substantial complement doctrine, and its nonconsideration of the full complement date, asserts that either in late March or in early April 1983,[10] petitioner's workforce suddenly grew to 105 (Bd. Br. 6) from approximately 55 to 60 employees who were in petitioner's employ in January, 1983. This increase was neither unexpected nor unplanned (JA 208), nor did the bulk of it occur in late March or early April. The record shows that up until April 22, 1983 (G.C. No. 8, JA 294-302), 15 employees were hired in January 1983, 8 in February, 36 in March and 11 in April. Of these 70 employees, 15 bargaining unit employees were hired between 3/20/83 and 4/10/83. This coincides with a gradual build up of production as the second shift employees were gradually added.

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[10] In this period Sterlingwale employees became less than a majority of petitioner's workforce (JA 294-302, Bd. Br. 6)

ARGUMENT

THE BURNS RATIONALE AND THE UNDERLYING CONCEPTS OF THE ACT REQUIRE A REVERSAL OF THE BOARD'S SUCCESSORSHIP DETERMINATION. PETITIONER SHOULD HAVE NO OBLIGATION TO RECOGNIZE AND BARGAIN WITH THE UNION.

Section 159(a) of the Act provides that ". . . representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ."

The concept of majority support for a bargaining representative lies at the heart of the successorship doctrine. Thus, the Court held in *Burns, supra* at 277:

> "Because the Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, the initial issue before the Board was whether the charging union was such a bargaining representative."

This case however does not rest on the stable foundations of the *Burns* case, to wit, a recent certification based on an election held but a few months before the successorship issue arose, or even a recent recognition based on a showing of majority status.

The Court in *Burns* as in all of its successorship cases was concerned with the balancing of two statutory policies, the first being the right of employees to representatives of their own choosing and the second being the policy of insuring industrial stability. Thus, the Court in *Burns* placed repeated emphasis on the recent certification of *Burns* predecessor, Wackenhut in an election which occurred but a few months before Wackenhut acquired the contract and began supplying guard services to Lockheed. Thus the Court satisfied its concern that the policy

of the Act regarding majority representation had been effectuated. Unless and until the initial majority representation concern is satisfied there is no basis for consideration of industrial stability. The *Burns* Court also pointed out that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective bargaining contract. The Court went on to point out *supra* at 278-279:

> "In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stems from its hiring of Wackenhut's employees and from the recent election and Board certification."

By comparison, here, there never was a Board certification, or even a recent recognition based on a showing of majority support. The bargaining relationship apparently continued for a period of 30 years without the wishes of the employees ever having been formally expressed in any manner other than the petitions signed in April 1983 by a majority of former Sterlingwale employees and new Fall River employees.[11] The Union based its claim to majority status solely on its expired collective bargaining agreement (which contained a Union security clause) and not on a claim that it represented a majority of

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[11] The occasion for these petitions was the concern of the petitioner's employees that the Union was attempting to come back. (JA 164, 171-172, 175) Rego, the Union's Secretary testified:

> "So they asked me to make a petition for 'em. And I went around asking everybody if they wanted the Union back. And the reason they - with Tony Cobral and others, they said they didn't get vacation pays, they don't want the Union back. And that's the God's-honest truth. (JA 104)

• • • • •

(Footnote Continued)

petitioners employees on October 19, 1982 or at any time thereafter. Clearly, under the holding of *Burns*, petitioner is not bound by the contract between the Union and Sterlingwale. Under these circumstances, there is no rational basis to support even a presumption of continuing majority support. The facts, rather than presumptions, demonstrate that shortly before the NLRB hearing, 89 employees, 58 of whom were former employes of Sterlingwale and 36 new employees (a majority in each group and an overall majority) repudiated the union as their collective bargaining representative because of the Union's failures regarding employee benefits. (JA 364-367)[12]

(Footnote continued)

> "Q. And the people in the dye house asked you to put this [the petitions] together because they wanted a raise?
>
> A. "No, they said to me - they knew I was coming up here [to the Board hearing] Monday. And they knew it was about the union getting back in there. So I guess, whatever it was about, they didn't like it; They put on the bottom there -" (JA 172)
>
> • • • • •
>
> "Well, they wanted a raise and they didn't want the union back, as far as I'm concerned. I mean, that's what they're telling me." (JA 175)

There is no evidence that the Union attempted to create or maintain any presence at petitioner or had any communication with any of the employees from the time of Fall River's first hirings in mid September 1982 up through the opening of the Board hearing on May 2, 1983. Apparently the Union made no attempt to sign up new, non Sterlingwale workers and did nothing more than file unfair labor practice charges on November 1, 1982 and rest on a presumption of majority support thereafter. Had the hearing been held on that date or any date up until January 15, 1983, the date determined by ALJ in his January 27, 1984 decision as the date when petitioner first employed a representative complement, the charges would have been dismissed. (A-28) *See Hedstrom Co. v. NLRB*, 558 F 2d. 1137 (3rd Cir. 1977) cert. denied 450 U.S. 996 (1981).

[12] Although the petitions were rejected in evidence by the Administrative Law Judge and the Court below for the reason that they were executed just a few days before the NLRB hearing May 2, 1983 rather than at some time

(Footnote Continued)

The Board attempts to minimize the effects of the demonstrated change in attitude towards the Union by the former Sterlingwale employees, by referring to cases in which it had been found that a presumption of an incumbent union's majority status survived a change of ownership long after the union's initial certification or recognition. (Bd. Br. 15-16 ff6) Those cases however involved a take over of a going business, along with at least a majority of the old owners former employees, with little or no hiatus timewise in business activity. In none of those cases was it found that any good faith doubt of continuing majority status existed as of the time of the takeover.

The recognition demand, concedely illegal when made on October 19, 1982 because it was premature and made at a time when the union did not represent a majority of employees under the substantial complement doctrine, was never repeated. The Board's continuing demand doctrine transmutes that illegal demand, based on an expired contract, based on a questionable presumption of continued majority support, into a supposedly legal demand as of January 15, 1983 without any additional basis other than the employment of additional employees by mid-January 1983 sufficient to meet the Board's representative complement test. The acretion of these presumptions on top of one another does violence to the principles of the Act. It denies the former employees of Sterlingwale as well as the employees never employed by Sterlingwale the right to select a bargaining representative of their own choice.

Four Justices of the Court in *Burns, supra*, at 406 cautioned against the extension of successorship under the banner of

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(Footnote continued)

before petitioner rejected the union's bargaining demand on October 21, 1982 (JA 180) (A-15), they were allowed to accompany the record as an offer of proof (JA 180). Those petitions and the uncontradicted testimony of Union officer Rego demonstrate a repudiation of the Union based on its failure to obtain payment for former Sterlingwale employees of insurance premiums, vacation pay and severance pay. The record indicates that the Union never pressed these grievances for arbitration. It may be fairly argued that this basis for repudiation existed in September of 1982 when petitioner began hiring employees and that it did not spring into existence only three days before the commencement of the hearing on May 2, 1983.

industrial peace at a sacrifice of the determination by the Board of the wishes of the majority of the employees which the Act was designed to protect. This Court has since *Burns* continued to express its concern with the rights of employees to representatives of their own choosing. *NRLB v. Financial Institution Employees, Local 1182*, ____, U.S. ____, 106 S.Ct. 1007 (1986) and *NLRB v. Action Automotive, Inc* 469 U.S. 490 (1985) reh. den. 105, S. Ct. 2041. And the Board itself has recognized that secret ballot elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has a majority support. *NLRB v. Gissel Packing Co.*, 395 US 575 (1969), *Linden Lumber Division v. NLRB*, 419 US 301 (1974). Yet this case marks a failure of the Board to safeguard those rights.

The Board argues that it is reasonable to presume that a change in ownership has not affected employee attitudes toward union representation where an employer retains as a majority of its own work force, employees who were represented by the incumbent union. The presumption has no factual validity in the case under consideration.[13]

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[13] The Board's reliance upon *NLRB v. Jarm Enterprises*, 785 F. 2nd 195 (7th Cir. 1986) is misplaced. *Jarm* involved the Board's one year certification bar rule which prevented Jarm from contesting the union's support among the employees. *International Union of Electrical Workers v. NLRB*, 604 F. 2nd 689 (DC Cir. 1979) is relied on by the Board for the proposition that a change in ownership without substantial changes in working conditions would cause the new employers workforce to "legitimately expect a continuity of bargaining rights". The quotation, however, refers to this Court's decision in *Wiley v. Livingston*, 376 US 543, 549 (1984) and refers (at page 694) to a *Wiley* type of fact situation, present in the *Electrical Workers'* case but completely absent here. *Electrical Workers' supra* was essentially a bargaining unit question and the court in *Electrical Workers* was expressly referring to the fostering of industrial peace without impeding economic development by balancing the interests of employees who legitimately expect a continuity of bargaining rights against the conflicting needs of employers to freely arrange newly acquired enterprises. Here, however, there was no need to guard employees' rights and expectations against precepitous change. Here, Sterlingwale became defunct, it ceased to exist as a continuing business, it was dismembered with its assets sold. Its business, did not continue. There was not a newly acquired enterprise such as existed in *Wiley* or *Electrical Workers supra*. A line must be drawn at some point, after which an entrepreneur can

(Footnote Continued)

THE BOARD HAS MISCONSTRUED THE EFFECT OF THE HIATUS IN THIS CASE.

Petitioner did not hire its first employee until 7 months after Sterlingwale laid off all production employees. The first shift was not fully operating until mid-January 1983 when the Board found a representative complement. Thus, there was a complete hiatus in employment with regard to Sterlingwale production employees of 7 months and a hiatus in terms of representative complement for 11 months. *Howard Johnson Co. v. Hotel Employees*, 417 US 249 (1974), as well as numerous cases relied upon by the Board involved immediate or almost immediate resumption of operations of a going business. In those cases the focus has been to examine the employing industry to see if a sufficient number of factors relating thereto remain unchanged, to warrant the imposition of successorship and a bargaining obligation.[14]

The Board disregards the significance and effects of the hiatus in this case by likening it a break in production while an old employer makes its exit and a new employer surveys its new property and formulates plans for its operation. (Bd. Br. 23)

(Footnote continued)

at arm's length, purchase assets at public sale, and thence embark on a new business without subsequently being compelled to recognize and negotiate with the union, which represented the employees of a former owner of those assets.

Furthermore employees expectations cannot be allowed to prevent a new enterprise from making necessary changes. Sterlingwale's accountants concluded that Sterlingwale could not exist even after a bankruptcy as a commission finisher "based on paying normal wage." (JA 132)

[14] Regarding the Board's claim that petitioner was formed in specific anticipation of Sterlingwale's decision to liquidate its business see *infra* pp. 4-5. Regarding the Board's assertion that petitioner was formed by Sterlingwale's former vice president (Chace) see *infra* p. 5. Regarding the assertion that petitioner was formed for the purpose of continuing the business [Sterlingwale's] of textile dyeing and finishing see *infra* pp. 5, 8-9. Furthermore petitioner does not engage in any textile converting and, while it may be doing business with some of the same customers in the textile trade, Sterlingwale had no hand in the acquisition of any of petitioner's customers. Regarding the Board's assertion that petitioner was formed specifically to take advantage of Sterlingwale's ready workforce see *infra* pp. 6-7.

This is not the case. Sterlingwale ceased to exist as a result of the piece meal liquidation of its assets, assignment for the benefit of creditors and foreclosure sale.[15]

The Board's assertion, made in an attempt to argue that Sterlingwale employees had a legitimate expectation of reemployment "once the operation resumed" is simply not supported by the record. (Bd. Br., 24) The Board presents no citation to the record for its claim that during the hiatus, Sterlingwale assured the laid off workers of its continuing efforts either to re-employ them or to see that another employer would take over and do so. Similarly, the Board (Bd. Br., 24) states that Sterlingwale maintained a small crew of employees to ship orders and to keep the plant and equipment in working order. This is incorrect with regard to the machinery. Ansin testified that Sterlingwale maintained some workers and supervisors from February 12 to July "looking over the machinery" (JA 147-148). He did not testify that the machinery was kept in working order. Actually, when petitioner acquired the machinery in September it took several weeks to put it into working order for even experimental production. The reality was that former Sterlingwale employees had no expectation of continued employment by Sterlingwale as a consequence of the long hiatus, the ongoing liquidation, and Ansin's statement in July 1982 that there were outside forces which would prevent the ressurrection of the business. There is also no support in the record for the Board's statement (Bd.

[15] Compare *NLRB v. Danecker Clock Co.*, 516 F. 2nd 315 (4th Cir. 1975), relied on by the Board as a case where a bargaining obligation was imposed despite a hiatus of 8 months. (Bd. Br., 24). In *Danecker* the employer closed its plant 10 days after the union was certified. The new employer reopened it 8 months later after purchasing not only all machinery and supplies but the right to the trade name. Additionally, two of the predecessors shareholders were entitled to seats on the Danecker Board of Directors until the purchase money mortgage was paid. *Danecker* was clearly a case in which the new employer intended to completely resurrect the business that it purchased, not merely to use plant and equipment purchased on the open market to start a new business. Petitioner made no attempt to acquire the trade name of Sterlingwale. Petitioner is not resurrecting or operating the business of Sterlingwale. It is operating a new business utilizing some of the former assets which belonged at one time to Sterlingwale.

Br. 24) that the Union offered its assistance in finding a new employer to reopen the plant.[16]

THE BOARD DID NOT PROPERLY CONSIDER FIXING THE APPROPRIATE TIME AT WHICH TO DETERMINE WHETHER STERLINGWALE'S EMPLOYEES CONSTITUTED A MAJORITY OF PETITIONER'S WORK FORCE.

The Board applied its substantial and representative complement doctrine without engaging in any balancing of the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible. It has wholly failed to consider whether this case presents one of the situations referred to by this Court where it;

> ". . . may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with the union, since it will not be evidence until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act, ..." *Burns, supra* at 295.[17]

The Board's decision makes no attempt to balance the conflicting goals, or to rationally explain why the large number of employees hired after January 15, 1983 should be deprived of their right to select a bargaining representative.[18]

[16] What the Union offered was to meet with any prospective new employer found by Ansin. (JA 68)

[17] The Court in *Burns* did not consider the appropriate time period for measuring majority status inasmuch as Burns had been found guilty of the unfair labor practice of soliciting representation cards for another Union. Hence, the Court held it was ". . . imperative that the situation be viewed as it was when Burns hired its employees for the guard unit, a majority of whom were represented by a Board-certified union."

[18] According to the record, (GC Exhibit 8, JA 294-302), nine employees were hired after January 15, 1983, eight were hired in February, 1983, thirty-six

(Footnote Continued)

Since the total of employees employed by petitioner in the unit amounted to between 106 and 109, as of the time of the hearing, the Board's mechanical application of the substantial complement doctrine deprived almost 50% of the work force employed by petitioner of a voice in the choice of their bargaining representive. It is submitted that the Board's approach clearly does not further the policies of the Act.

The Board reasons however that petitioner had reached substantially normal production in mid-January at which time the first shift was in full operation and petitioner had begun a second shift (Bd. Br. 31). The Record does not support the conclusion that normal production was less than two full shifts.[19]

The Board contents that its determination that petitioner was obligated to recognize and bargain with the Union in mid-January (Bd. Br. 32) was reasonable. It is premised, however on a supposition that petitioner had reached substantially normal production in mid-January and that petitioner had reached a substantially normal work force and level of operation by that time. The Board ignored almost 50% of the work force. Petitioner had definite employment expansion plans and consistently hired over the ensuing months until it reached its goal. It could not be evident until that time whether the unit contained a majority of former Sterlingwale employees. Even then,

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(Footnote continued)

were hired in March, 1983, and eleven were hired in April 1983 through April 22nd. Of those sixty-four employees, a total of thirteen were no longer employed by petitioner as of April 22, 1983. One employee hired after January 17 quit in February. One employee hired in February quit in March. Nine employees hired in March, quit in March or April. One employee hired in April, quit and the other employee hired in April was discharged. There was therefore a net total of fifty-one employees hired after January 15, 1983 who remained on payroll as of April 22, 1983, the date of the Exhibit.

[19] It can also be argued that substantially normal production is the full operation of the second shift in April, which was necessary in order to dry goods worked on during the first shift (JA 227). Chace's testimony indicates a clear intent to expand production capacity to two full shifts (JA 208). There is also no support in the record for the Board's statement (Bd. Br. 32) that future growth was not expected for at least two more months (after mid-January, 1983).

presuming that 100% of former Sterlingwale employees desired to be represented by the Union, they then represented a minority of the bargaining unit. Clearly the representation wishes of the Fall River employees would be best served by a Board election rather than assumptions based on a naked head count.

THE BOARD'S CONTINUING DEMAND THEORY IS UNREASONABLE AND IS BASED UPON AN UNPROVED HYPOTHESIS.

The Board urges (Bd. Br. 40) that it is not uncommon in successorship cases for the union's bargaining demand to be made before it is clear that a bargaining obligation has arisen. It cites no authority for that proposition. It urges as a generality that the realities of business transfers are such that unions often lack precise information about whether and when a change in ownership is to take place and what plans the new owners have for the enterprise (Bd. Br. 40-41). This generality and preceeding unsupported hypothesis apparently formed the rationale here for the Board treating the Union's bargaining demand as continuing until such time as Fall River employed a representative complement. The fallacy of the Board's approach is that it again ignores the reality. Here, the bargaining demand was based solely on the successors and assigns provisions of the expired contract with Sterlingwale. The Union at no time claimed that it represented a majority of petitioner's employees. Furthermore, the Union made no effort either before the bargaining demand or at any time after the bargaining demand, to ascertain the plans petitioner had for the new enterprise. The Board is not entitled to presume that had such information been requested by the Union, that it would not have been forthcoming. The Board argues that the employer is in a position to know at some future time when and whether a majority of its workforce came from the predecessor at a time when job classifications for the operation were filled or substantially filled. This argument places an unreasonable burden upon an employer and forces him to accept an assumption of majority support previously shown to be clearly erroneous.

The Board argues that it is clear that the Union's repetition of its initial bargaining request would have been futile and

therefore a renewed demand should not be deemed necessary to the finding of the violation here (Bd. Br. 43). In response, it must be emphasized that at no time did the Union claim that it represented a majority of petitioner's employees. It sought to bargain on the basis of Sterlingwale's contract, just as the union in *Burns* sought to compel Burns to be bound by the substance of Wackenhut's contract with Lockheed.

CONCLUSION

It is respectfully submitted that the Board's decision requiring Fall River Dyeing & Finishing Corp. to bargain, as enforced by the First Circuit, should be denied enforcement and reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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NO. 85-1208

IN THE

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Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA URGING REVERSAL

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NO. 85-1208

IN THE
SUPREME COURT OF THE UNITED STATES
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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA URGING REVERSAL

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston and shares certain personnel and activities with the law school. Its goals, among others, include the preservation of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties. In pursuit of its purpose to enhance the function of the market system, LFA has frequently appeared as amicus curiae in cases involving labor issues both in this Court and in lower courts. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, businesspeople and academics.

SUMMARY OF ARGUMENT

The result below cannot be justified in terms of the need to

preserve "continuity" in labor relations, since the alleged predecessor has completely ceased doing business. In such a case, usual successorship principles do not apply. This case is clearly distinguishable from *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) as it does not involve, as *Burns* did, the takeover of an intact bargaining unit with a recently elected bargaining representative, indicating actual majority support. Further, the determination of the duty to bargain herein was made prior to the hiring of a "full complement" of employees, as required under *Burns*.

The facts of this case do not support a result which overrides the statutory right of the employee to be represented by a bargaining representative of his own choosing, or which bases the duty to bargain on fortuitous acquisitions of materials, use of facilities, and hiring of personnel by a new, unrelated, company. The adverse legal and economic consequences of such a result can and should be avoided by requiring a new representation election.

ARGUMENT

I. THE USUAL JUSTIFICATIONS FOR FINDING SUCCESSORSHIP DO NOT SUPPORT THE RESULT HEREIN.

A. There is no continuity of operation or set of employee expectations to be preserved in this case.

The usual justifications for findings of successorship simply do not apply to a case such as this one where the employing enterprise has completely gone out of business and laid off all of its work force. Workers who have lost their jobs and have no prospects for regaining them cannot be protected from a "sudden change in the employment relationship," which was the major justification for this Court's finding of successorship in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964), nor is there any longer any "continuity in industrial labor relations" to be preserved. *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 300 (1972) (Rehnquist, J., dissenting).

This Court has recognized the need to treat the closing of a business differently from other changes in the highly protected area of discrimination against union members in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), in stating that the "closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place." *Id.* at 274. If a complete closing ends any claims of discrimination, then surely it ends any claims regarding a duty to bargain.

B. There has been no voluntary takeover of an intact bargaining unit in this case.

This Court's finding of a duty to bargain in *Burns*, *supra*, cited by Respondent in support of its position herein, *see, e.g.*, Respondent's Brief at 7, 8, is not really justified on usual successorship principles. In that case there was no relationship between the two companies, other than the fact that one took over the job previously performed by the other. As Justice Rehnquist pointed out in his dissent, to apply the successorship doctrine in a situation such as that "stretche[s] that concept beyond the limits of its proper application." 406 U.S. at 296 (Rehnquist, J., dissenting). The majority, in fact, was very careful to limit the holding to the specific fact situation involved, a situation which did not depend on a traditional successorship analysis. After emphasizing that the decision "turns to a great extent on the precise facts involved," 406 U.S. at 274, the Court made it very clear that the source of Burns' duty to bargain was "the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year." *Id.* at 287. *See also id.* at 278-79, 281. The decision did not depend, therefore, on successorship factors, but rather on the conclusion that the unique fact situation involved indicated "that the bargaining representative represent[ed] a majority of the employees in the unit *as required by sec. 9(a) of the Act.*" *Id.* at 295. (Emphasis added.)

A duty to bargain in the case at bar likewise cannot be found in the usual successorship principles. There is clearly no ownership relationship between the two companies involved, the Petitioner having acquired such assets of Sterlingwale as it did acquire at public auction during liquidation. *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 435 (1st Cir. 1985) (Torruella, J., dissenting). In these circumstances, the new company is not buying from the alleged predecessor at all, but from a trustee—in essence, from the creditors of the "predecessor." Therefore, if a duty to bargain is to be found, it must be found in circumstances which, like those in *Burns*, indicate an actual majority representation. Yet the situation herein is sharply different from that in *Burns* in many respects.

This case is distinguishable, first of all, because there had been no recent selection of a bargaining representative in this case, as the Court repeatedly emphasized that there was in *Burns*. 406 U.S. at 278, 281, 287. As the dissenting Judge below pointed out, here there had not been "any expression of union preference by the employees for many years," nor was there a labor contract in existence. 775 F.2d at 437 (Torruella, J., dissenting). Furthermore, while it has been suggested that a change in owners may change employee sentiment toward a particular union, Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 763 (1975), this change in sentiment is particularly to be suspected when the workers lost their jobs due to the bankruptcy of the company when they were represented by the previous union. Furthermore, the changed sentiment, if any, should be discovered by an election.

A further significant distinction between the cases is the fact that the Board determined that the duty to bargain arose prior to the hiring by Fall River of a "full complement of employees," as required by this Court in *Burns*. 406 U.S. at 295. While something less may be a *factor* to consider in deciding whether there is sufficient continuity in the employing enterprise to find a duty to bargain, where there is essentially *no* continuity the decision must turn on indications of actual majority representation. It is hard to imagine many situations in which such a determination could be made prior to the hiring of the

"full complement of employees."

The "full complement" standard is not only preferable in insuring a more accurate determination as to majority representation, but is also fairer in terms of predictability of the time the duty to bargain arises. The employer will know when he has hired his full complement of employees, but will be forced to second-guess the union and the Board in deciding when a "representative complement" has been reached. Since the consequence of guessing wrong may be a finding of an unfair labor practice, a clearer standard is needed.

II. STATUTORY AND POLICY CONSIDERATIONS MILITATE AGAINST A FINDING OF SUCCESSORSHIP IN THIS CASE.

The right to be represented by a bargaining representative of one's choosing is a right protected by statute, 29 U.S.C. sec. 159(a) (1982), and should not be sacrificed to the doctrine of successorship, a doctrine developed by the Board under its authority to administer the National Labor Relations Act. *See* Comment, *The Successor Employer's Obligation to Bargain: Current Problems in the Presumption of a Union's Majority Status*, 8 FORDHAM URB. L.J. 429, 429-430 (1980); Comment, *Criteria for Determining Employer Successorship—Factor Analysis, Burns and the Need for a New Standard*, 11 WAKE FOREST L. REV. 437, 438 (1975). A finding of successorship under this doctrine involves a balancing of the statutory right with the goal of preserving industrial peace. *Id.* Where, as in this case, there are no real employee expectations, and hence no real question of "preserving industrial peace," there is no justification for sacrificing the important statutory right of the employees to be represented by a representative of their own choosing.

Further, as has been pointed out, Petitioner has started a new company in this case. It has not dealt directly with Sterlingwale, has received no benefits from Sterlingwale, *see* Petition for a Writ of Certiorari at 3, and there has been a "major changeover in the supervisory hierarchy." *Id.* at 13. In such a situation, there is no reason to saddle it with Sterlingwale's

obligations. This Court, in *Burns*, recognized that the willingness of a company to "take over a moribund business" may be adversely affected if it is involuntarily held to the terms of that business's collective bargaining agreement. 406 U.S. at 287-288. Likewise, requiring a company to bargain with a particular union (or risk being found guilty of an unfair labor practice), based on the fortuitous acquisition of equipment and supplies, the use of an existing, inactive physical plant, and the hiring of unemployed workers in the area, may discourage the use of such resources.

The problems inherent in such a scenario are apparent when one considers the possible ramifications, for example, in a city such as Houston, Texas, the city in which the offices of this Amicus are located. Business bankruptcies in Houston increased between 1981 and 1986 by more than 400 per cent, and 21,500 bankruptcy cases are currently pending in the Houston District. Reid, *Reporter: Going for Broke,* July 1986 TEX. MONTHLY 82. The detriment to the economy and the public from an approach which would inhibit the use of both the material and the human resources rendered idle in such situations is self-evident. The problems created in a relatively small town could be even greater, since there would be a more limited pool of potential employees and material assets, increasing the likelihood of a new company being found to be a "successor." When such problems could so easily be avoided by the simple expedient of requiring a new representation election when a new company is involved, there is no justification for not imposing such a requirement.

CONCLUSION

The decision of the Court of Appeals should be reversed.

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BRIEF

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36(2). Letters of consent are on file with the Clerk of the Court.

the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[2]

This case involves the issue of whether, and under what circumstances, an employer purchasing the assets of a defunct business enterprise must recognize a labor union which represented the employees of its predecessor. More specifically, this Court must decide whether such an employer may be considered a "successor" employer for purposes of collective bargaining when employees of the predecessor company constitute a minority of the full employee complement actually hired by the purchaser.

The Chamber and its members have a vital interest in the outcome of this case. Those members purchase and sell assets of their businesses from time to time and, as this Court recognized in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), those decisions are sometimes affected by the obligations of the purchaser to deal with the union that represented the seller's employees. Where the seller's union clearly represents a majority of the purchaser's employees, then labor peace and an effective program of employee relations may be served by the purchaser's recognition of the union. Where a majority of the purchaser's employees do not

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[2] E.g., *Golden State Transit Corp. v. Los Angeles*, —— U.S. ——, 89 L. Ed. 2d 616 (1986); *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 85 L. Ed. 2d 206 (1985); *Trans World Airlines v. Thurston*, —— U.S. ——, 83 L. Ed. 2d 523 (1985); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

desire that union, however, labor peace and employee job satisfaction may be disrupted.

That reality is recognized in our national labor laws which require majority rule in employee selection or rejection of a collective bargaining representative. That concept of majority rule, as expressed in Section 9(a) of the National Labor Relations Act (29 U.S.C. § 159 (a)), is essential to the preservation of our nation's basic labor policy and to the labor peace and stability that result from union representation based upon the wishes of a majority of affected employees, not the hypothetical desires of a minority of workers.

The NLRB's decision in this case interferes with the majority rule principle by imposing a collective bargaining representative on a workforce based upon the prior union association of a minority of the employees in that workforce. The Chamber and its members are concerned that this decision will ill-serve their interests and the interests of their employees, and, accordingly, the Chamber submits this brief urging a reversal of the NLRB's decision.

STATEMENT OF THE CASE

This is a successorship case arising out of the purchase of some of the assets of an insolvent textile printing and finishing company (Sterlingwale) and the subsequent operation of a similar business by Fall River Dyeing and Finishing Corporation ("Fall River"). The facts are largely uncontested.

Sterlingwale had operated three textile dyeing and finishing plants for over 30 years when it was forced to close those plants in early 1982 because of severe financial difficulties. Its employees had been represented for at least 18 of those years by Local 292 of the United Textile Workers of America ("the Union" or "Local 292"), whose last collective bargaining agreement with Sterling-

wale expired on April 1, 1982 (Certiorari Petition Appendix at 18 (hereafter "P.A. ——").[3]

On February 12, 1982, Sterlingwale shut down all of its textile operations and laid off its production and maintenance employees (P.A. 35-36). Several months later, in August, Sterlingwale finished winding down its business and made an assignment of its assets for the benefit of creditors. At a subsequent creditors' auction, Fall River purchased Sterlingwale's equipment and machinery and some of its materials and inventory, and it leased one of Sterlingwale's old buildings that had been purchased by a new owner (P.A. 26, 36). Thereafter, it began advertising for employees to staff its new facility. On September 20, 1982, Fall River hired the first of its new employees and began about ten weeks of cleaning and repairing machinery and running experimental production to ensure that the plant and equipment were operating efficiently. Its plans called for it to staff a one-shift operation of 55-60 employees by late January 1983 and to expand to a full, two-shift complement of 106-109 employees by April 1983 (P.A. 4-5, 20).[4]

On October 19, 1982, Local 292 demanded that Fall River recognize and bargain with it as the representative of Fall River's new workforce (P.A. 19). At the time Fall River had only 21 start-up employees of its anticipated 106-employee complement,[5] and the Company refused to bargain with the Union (P.A. 4-5). There-

[3] The Administrative Law Judge found that Sterlingwale's employees had been represented by Local 292 "for about 30 years" (P.A. 36 n. 1). Fall River's Petition for Certiorari in this case (p. 3), as well as the dissenting judge below (P.A. 18), state that Local 292 had represented Sterlingwale employees since 1968.

[4] A two-shift operation was necessary because a complete cycle in the production process could not be completed during the course of one shift (P.A. 5).

[5] Eighteen of those 21 employees had previously been employed by Sterlingwale (P.A. 19).

after, Fall River implemented its earlier operational plans. By January 15, 1983 it had staffed its first shift with 55 employees, 36 of whom were former Sterlingwale employees (P.A. 20), and by mid-April, 1983 it had reached its full two-shift complement of 106 employees, the majority of whom had never worked for Sterlingwale (P.A. 20). Indeed, former Sterlingwale employees had not constituted a majority of Fall River's workforce since mid-March, 1983 (P.A. 20), and most of those employees apparently did not support Local 292 because 89 of Fall River's 106 employees later signed a petition rejecting representation by the Union. See n. 7, *infra.*

Based on these facts, the NLRB concluded, and the First Circuit affirmed, that Fall River violated Section 8(a)(5) of National Labor Relations Act ("the Act") by refusing to recognize and bargain with Local 292. The Board acknowledged that Fall River had lawfully declined to recognize Local 292 on October 19, 1982—the only date the Union ever requested recognition—because at that time Fall River had not come close to hiring all or even a representative complement of its anticipated workforce of 106 employees (P.A. 4-5, 28). Indeed, even though 18 of the 21 employees working in October 1982 were formerly employed by Sterlingwale and represented by Local 292, Fall River's recognition of the Union at that point would have violated Section 8(a)(2) of the Act.[6]

The Board also acknowledged that Fall River had not violated the NLRA when the complaint in this case was issued on December 20, 1982 or when that complaint was

[6] Section 8(a)(2), 29 U.S.C. § 158(a)(2), prohibits employers from recognizing a union that does not represent a majority of the employer's employees in an appropriate bargaining unit. Employers violate this provision if they recognize a union before they have hired a representative complement of employees in the bargaining unit for which the union is recognized. *See, e.g., Herman Brothers, Inc.*, 264 NLRB 439 (1982).

answered by Fall River on January 4, 1983. In both instances, Fall River had not yet hired a representative complement of its employees and, accordingly, would have violated Section 8(a)(2) had it recognized and bargained with Local 292.

Furthermore, it was also clear that the Union did not represent a majority of Fall River's employees at the time of the NLRB hearing on May 2, 1983, since the Company had reached its full complement of 106 employees in mid-April 1983 and only a minority of those workers were former Sterlingwale employees who had been represented by the Union (P.A. 20).

Nevertheless, the NLRB found a violation of Section 8(a)(5) by combining several legal theories and presumptions. First, the Board found that the Union's October 19th demand for recognition, although inappropriate at the time, was a "continuing" demand for recognition which could later become appropriate. Second, the Board looked back over Fall River's hiring process and found that such a demand would have been appropriate on January 15, 1983, when the Company's hiring had reached a point that a "substantial and representative complement" of its full workforce had been hired (55 of the 106 employees which were to be in the full complement). Third, the Board presumed that the 36 former Sterlingwale workers employed by Fall River on January 15 supported Local 292 because they had been part of a bargaining unit represented by the Union at Sterlingwale.[7] Thus, putting all of these theories together, the Board held that Fall River automatically violated its statutory duty to bargain on January 15, 1983, because Local 292 represented a majority of a representative complement on that date and the Company failed to notify Local 292 that it would recognize and bargain with the Union regarding its workforce. See P.A. 37-39. Accordingly, the NLRB ordered Fall River to recognize and bargain with Local 292 as the exclusive bargaining agent for its 106 employees (P.A. 31-42).[8]

[7] The NLRB engaged in this presumption even though Fall River had offered into evidence employee-circulated petitions indicating that 89 of its 106 production employees did not wish to be represented by the Union (Respondent's Exhibits 1 and 2 in the NLRB proceeding). The NLRB and the First Circuit rejected this evidence on the ground that, having been signed by Fall River's employees in April 1983, the petitions could not justify Fall River's earlier failure to bargain on January 15, 1983 (see P.A. 15-16).

In sum, the NLRB found Fall River guilty of an unfair labor practice even though Fall River had done nothing to violate the Act when it refused the Union's demand for recognition in October 1982, when the Union filed its unfair labor practice charge which was the basis for this case on November 1, 1982, when the case was investigated by the NLRB in November and December, 1982, when the NLRB's Regional Director issued the

[8] The NLRB, its Administrative Law Judge and the First Circuit never explained why Fall River continued to have an obligation to bargain after it had hired its full complement of workers, only a minority of whom came from the old Sterlingwale workforce. The First Circuit, apparently based upon the *post hoc* rationalizations of the Board's appellate counsel, did find that Fall River could not defend against the Board's refusal to bargain complaint by showing that a majority of employees had signed petitions disclaiming interest in representation by Local 292 (see n. 7, *supra*). The court based that ruling on the ground that an employer who commits an unfair labor practice (here a refusal to bargain on January 15, 1983) may not thereafter rely upon employee sentiment against the union which was the foreseeable result of the employer's illegal conduct (P.A. 15-16). Even if that concept may be valid in other circumstances, it does not address the pertinent issue here. Here the only reason Fall River allegedly had an obligation to bargain was the presumption that a majority of its representative complement supported Local 292 because they formerly worked for Sterlingwale. The loss of that majority support for the union came in this case not from any unfair labor practices but, rather, from the fact that Fall River completed its lawful hiring process and the makeup of its workforce no longer supported any presumption that a majority favored union representation.

complaint in this case on December 21, 1982, or when Fall River honestly and correctly answered that complaint by denying any violation on January 4, 1983. See P.A. 19-20. More importantly, the Board ordered Fall River to recognize and bargain with Local 292 as the representative of its 106 employees even though only a minority of those employees had ever worked for Sterlingwale and even though over 80 percent of those employees had indicated that they did not want to be represented by Local 292. For the reasons which follow, we respectfully submit that the Board's decision, as enforced by the First Circuit, should be overturned and denied enforcement by this Court.

SUMMARY OF ARGUMENT

The National Labor Relations Act provides that employees shall be represented by a union only if a majority of employees in an appropriate unit desire representation. The prescribed (and preferred) method for determining the will of the majority is through secret ballot elections conducted by the NLRB.

There are a few limited exceptions to the general principle that a union should be selected by secret ballot. One of those exceptions is called the "successorship" doctrine. That doctrine was initially developed in cases in which the purchaser of a business (the "successor") continued the seller's business at the same location with the same employees who were already represented by a union at the time of the sale. The NLRB, with circuit court approval, reasoned that because the working life of the employees was basically unaffected by the mere change of ownership, there was little reason to doubt that they desired to continue their union representation. As a consequence, the Board concluded that such representation need not be suspended by requiring those employees to vote anew.

Over the years the successorship doctrine grew and expanded from that humble beginning. Board and court decisions began to require automatic union representation of a successor's workforce even though the successor hired only part of the seller's workforce. The expansion of that doctrine reached new limits in the Board's *Burns* decision, which was ultimately reviewed by this Court in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

In *Burns* the successor hired a total new workforce of 42 employees, 27 of whom came from the union-represented workforce of its predecessor. By presuming that all 27 of the predecessor's former employees continued to support their former union, the NLRB ordered Burns to bargain without an election. In a sharply-divided 5 to 4 decision, this Court upheld the Board because the predecessor's employees had voted just a few months earlier for union representation. Thus, given the facts of that case, a majority of this Court found little reason to fault the Board for applying its normal rule that majority support for a union will be presumed to continue during the first year of the union's certification, even if there is a change of ownership.

In the fourteen years since *Burns*, the facts and rationale for that decision have been increasingly ignored. As a result, the Board and courts have concluded that *Burns* requires any successor employer to bargain with the union that represented the predecessor's employees, no matter when or how that union was selected, so long as the successor has hired a majority of its workforce from among the former employees of the predecessor. Indeed, more recently the Board has concluded that a successor's employees must be represented by the predecessor's union even if a majority of the full workforce never worked for the unionized predecessor, but a majority of the start-up crew did. In the process, the Board and courts have required employers to bargain with

unions that have never been elected or supported by a majority of employees.

This case clearly illustrates the extent to which the doctrine of successorship has run amok and is in desperate need of review. Here, at a creditors' auction, Fall River purchased some assets of a business that had been closed down for seven months; it hired a workforce of over 100, less than half of whom had worked for the prior owner of those assets; and it was presented with a petition from over 80 percent of its employees advising that they did not desire union representation. Nevertheless, the Board ordered Fall River to bargain with the union that had represented the employees of the prior owner for over 18 years. Why? Because at a point in its staffing process Fall River employed 36 of the old owner's employees as part of its expanding 55-person workforce—a "majority," indeed a "magic majority," because there was no indication that those 36 employees were even employed by the prior owner when the Union was first recognized 18 years earlier, much less that they ever expressed any present desire to be represented by that or any other union.

Thus, under a statute which requires majority support for union representation and which provides for secret ballot elections as the means for determining that majority support, the Board has concluded that no election is needed to unionize a workforce that is over 80 percent opposed to union representation.

Clearly, then, a review of the successorship doctrine is long overdue. By imposing union representation on countless employees based upon naked headcounts with no factual basis for presuming union support, the Board and the courts have distorted not only this Court's *Burns* decision, but also the fundamental principles of the NLRA. By engrafting the "representative complement" and "continuing demand" theories onto its successorship analysis, the Board has compounded this distortion. Application of those theories in a successorship context results in piling presumption on presumption, imposes union representation when it is clear that the predecessor's former employees will not constitute a majority of the successor's full workforce, requires successor employers to engage in meaningless bargaining because they know the union's presumed majority support will soon disappear through additional hiring, and places successor employers in the untenable position of having to walk a tightrope between violating Sections 8(a)(2) and 8(a)(5) of the Act.

Moreover, there is a simple answer to all of these problems created by the Board's approach, and that answer lies in Congress' determination that NLRB-conducted elections are the best method for ensuring expeditious implementation of employees' free choice in selecting bargaining representatives. Under the majority rule principle of the Act, no successor employer should be required to bargain with a predecessor's union without an election unless the successor takes over the predecessor's entire workforce and business virtually intact *or* unless three conditions are met: (1) the successor has completed its staffing with a full complement of employees; *and* (2) a majority of that full complement previously worked in the predecessor's union-represented workforce; *and* (3) there is a strong factual basis (e.g., at least a recent certification) for presuming that those former employees of the predecessor do, in fact, presently desire representation by the union. Thus, to represent employees in a "representative complement," a union should have to petition for and win an NLRB election. To represent employees in a full complement, the union should have to either establish that the foregoing tests are met or petition for and win an NLRB election.

Only this approach fully serves the free choice and majority rule principles of the Act. At the same time it offers no serious disadvantage to the predecessor union

or the employees it seeks to represent. If the union actually has majority support in either a representative or full complement of the successor's employees, it will have no trouble collecting signed authorization cards from employees and petitioning for and winning an election. Indeed, such an election process should take far less time than the four years it has taken to litigate this unfair labor practice case which seeks to foist a union upon a group of employees who have never voted for union representation.

ARGUMENT

FALL RIVER HAD NO OBLIGATION TO BARGAIN WITH THE UNION THAT REPRESENTED THE EMPLOYEES OF ITS PREDECESSOR

The very cornerstone of the National Labor Relations Act is the concept of majority rule—that employees shall not be represented by a union unless and until a majority in an appropriate collective bargaining unit support representation by that union. The prescribed and preferred method for determining the will of the majority is the holding of an NLRB secret ballot election. *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). The doctrine of "successorship" has historically been one of the very limited exceptions to the rule that a union must prove its majority status through an election victory.

This Court has only once before been called upon to determine under what circumstances a "successor" employer may automatically be obligated to bargain with the union that represented the employees of its predecessor without the need for an election.[9] In *NLRB v. Burns*

[9] A purchaser of a business may be a "successor" under the National Labor Relations Act for some purposes and not for others. *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 n. 9 (1974). For example, a purchaser may be a "successor" to the extent that it is required to arbitrate employee grievances that arose when the seller still owned the business (*Howard Johnson Co., supra; Wiley & Sons v. Livingston*, 376 U.S. 543 (1964)); another purchaser may be a "successor" only for purposes of remedying unfair labor practices committed by the seller before the purchase (*Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)); and still another business purchaser may be a "successor" that is obligated to recognize and bargain with the union that previously represented the seller's employees. The instant case involves only this third type of "successorship."

International Security Services, 406 U.S. 272 (1972), a sharply divided Court held that a successor employer *may* be so obligated, but only when (1) the successor continues its predecessor's basic employing enterprise and (2) a majority of its workforce previously worked for the predecessor and can be presumed to still support the union that represented them with the predecessor.[10] As we show below, the NLRB and the First Circuit have

[10] Given the fact-specific nature of the *Burns* "business continuity" criterion, the Chamber will address only the "majority" issue in the sections which follow. We submit, however, that Fall River and the dissenting judge in the First Circuit are correct in asserting that the requisite business continuity is not present in the instant case. (See P.A. 26-27; Petition for Certiorari, pp. 8-15.) To establish that necessary continuity, the Board must show that Fall River continued Sterlingwale's basic employing enterprise in the sense that it continued to make essentially the same products for the same customers using essentially the same employees doing the same basic work with the same equipment and machinery in the same plant under similar working conditions with essentially the same supervision. *Howard Johnson, supra; Burns, supra*, 406 U.S. at 280, 295; *Golden State Bottling, supra*, 414 U.S. at 184 n. 6; Brief for the National Labor Relations Board In Opposition to the Petition for Certiorari in this case, pp. 7-10; P.A. 6-9. Here, however, Sterlingwale's business had been closed down and its employees terminated for seven months before Fall River acquired some of Sterlingwale's machinery and assets at a creditors' sale and leased one of Sterlingwale's old plants from a new owner. Fall River did not purchase any trade names, good will, or customer lists from Sterlingwale, it did not take any of Sterlingwale's personnel records, and it assumed none of Sterlingwale's liabilities. Finally, Fall River's operation involved a smaller plant, fewer and different employees, fewer work shifts, longer working hours and different kinds of business than had Sterlingwale's operation.

stretched the *Burns* successorship doctrine beyond all recognition and have inappropriately applied a "representative complement" doctrine and a "continuing demand" theory to deprive employees of their freedom to choose or reject a bargaining representative.

A. Proper Application Of The *Burns* Rationale Requires Reversal In This Case

Since this Court's *Burns* decision in 1972, that case has come to be viewed as establishing that a successor employer must automatically bargain with the union representing its predecessor's employees if the successor hires a majority of its workers from the predecessor's workforce. This view of the *Burns* "majority" criterion has led the NLRB and the courts to base successor bargaining obligations on simple headcounts of the predecessor's employees in the successor's workforce, with no attention to whether there is any factual basis for presuming that those employees desire representation by the predecessor's union.[11] It is submitted, however, that *Burns* did not establish such a simplistic exception to the rule that a union's majority support must be established by a secret ballot election.

In *Burns* the Court had to deal with two policies underlying the National Labor Relations Act: the Act's fundamental premise that a majority of affected employees should have the right to determine whether or not they wish to be represented by a union, and the Act's goal of removing employee frustration and its attendant adverse impact on industrial peace by allowing employees to have

[11] E.g., *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623 (9th Cir. 1983); *NLRB v. Hudson River Aggregates*, 639 F.2d 865 (2d Cir. 1981); *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980); *NLRB v. Pre-Engineered Bldg. Products, Inc.*, 603 F.2d 134 (10th Cir. 1979); *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609 (9th Cir. 1977); *Indianapolis Mack Sales*, 272 NLRB 690 (1984); *Aircraft Magnesium*, 265 NLRB 1344 (1982), *enf'd*, 730 F.2d 767 (9th Cir. 1984).

union representation as quickly as possible, if that is the will of the majority. E.g., *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983). The *Burns* majority believed that the second policy could be served in that case without doing undue violence to the concept of employee free choice which underlies the NLRA. Importantly, however, the lack of violence to the principles of majority free choice was premised upon the particular facts of that case—facts which are not present here or in most post-*Burns* "successor" cases for that matter.

The union seeking recognition from the successor employer in *Burns* had been certified to represent the predecessor's employees following an election only three months before Burns took over the predecessor's business. Burns hired 27 of the predecessor's union-represented employees as part of its 42-employee workforce. A majority of this Court held that where the predecessor's employees were represented by a union elected and certified only three months before, and where the successor (Burns) hired a majority of its workforce from that group of employees, it was acceptable for the Board to presume majority support for that union among Burns' employees and to enforce the Board's normal requirement that an employer (or its successor) must bargain with a union during the first year after its certification.[12] The majority stated (406 U.S. at 278-279, 281, 287):

> In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees. . . . Burns' obligation to bargain with the union over terms and conditions

[12] In *Brooks v. NLRB*, 348 U.S. 96 (1954), this Court approved the Board's "certification-year" rule, under which, absent "unusual circumstances," majority support for a union is almost conclusively presumed to continue for a year following the NLRB's certification of the union. See *Burns*, 406 U.S. at 279 n. 3.

of employment stemmed from its hiring of [the predecessor's] employees and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership . . . is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees [remain employed after the change].

* * * *

[W]here . . . a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.

* * * *

The source of [Burns'] duty to bargain with the union is . . . the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year.

Even these facts, however, were not sufficient to convince four members of the Court that a majority of Burns' employees could be presumed to support representation by the union (406 U.S. at 297, 306):

> [I]t is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract. . . . True, 27 of the 42 had been represented by the union when they were employees of [the predecessor], but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent . . . . There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by [the predecessor], had ever expressed their views one way or the other about the union as a bargaining representative. It may be

> that, if asked, all would have designated the union. But they were never asked.
>
> * * * *
>
> The rigid imposition of a prior-existing labor relations environment on a new employer whose only connection with the old employer is the hiring of some of the latter's employees and the performance of some of the work which was previously performed by the latter, might well tend to produce industrial peace of a sort. But industrial peace in such a case would be produced at a sacrifice of the determination by the Board of the appropriateness of bargaining agents and of the wishes of the majority of the employees which the Act was designed to preserve.

In short, this Court's *Burns* decision turned on the particular circumstances in that case—the recent union election and certification which arguably provided a factual basis for presuming that a majority of Burns' employees wanted to be represented by the union. Whatever the legitimacy of that presumption of majority support under the facts in *Burns*, it should not be applied wholesale to all successorship cases when there are no facts to warrant such a presumption.[13]

For example, the instant case provides a compelling illustration of how a naked headcount, irrespective of the facts, woefully disserves the employee free choice principles which are fundamental to the NLRA. Here Local 292 had been the bargaining agent of Sterlingwale's em-

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[13] Indeed, there is a substantial question about the continuing force of the *Burns* decision in view of this Court's decision two years later in *Linden Lumber, supra*. There the Court held that an employer may refuse to voluntarily recognize a union that is claiming majority support on the basis of recently signed authorization cards. *A fortiori*, it would seem that a successor employer should be able to refuse recognition when the only basis for the union's claim of majority support is the fact that a majority of the successor's employees were previously in a bargaining unit represented by the union.

ployees for at least 18 years. There is no indication that any 1982 employee of Sterlingwale had ever expressed his or her views in favor of Local 292 representation. In fact, it is likely that most were not even employed when Local 292 first became the bargaining representative. On the date that the Board concluded that Fall River was required to bargain with Local 292 (January 15, 1982), Fall River employed a workforce of 55, 36 of whom had been Sterlingwale employees (P.A. 5), and as the Company continued its hiring, the former Sterlingwale employees made up less than 50 percent of its employee complement a little over two months later. After hiring was completed in April, employees circulated petitions and 89 of the 106 employees indicated that they did *not* want to be represented by Local 292. Nevertheless, the NLRB ruled that they *must* be represented by that union. In essence, then, the Board here imposed union representation on 106 employees when there was not only no factual basis for a presumption of majority support, but when there was affirmative evidence showing that such a presumption would be completely inappropriate.

In summary, the Board has extended this Court's *Burns* decision far beyond its factual and rational underpinnings. Whereas *Burns* arguably accommodated the majority rule principle and the desire for quick union representation by relying upon a factual basis for presuming majority support for a recently certified union, the Board in this (and in other post-*Burns* cases) has made no such accommodation. Instead, it has simply disregarded the principle of majority rule in favor of quick union representation whether the affected employees want that representation or not.

Accordingly, the Chamber submits that there are good reasons for this Court to revisit the NLRA principles underlying *Burns* and to re-emphasize that there must be some rational factual basis for presumptions of majority union support among a successor's workforce. Absent such a sound factual basis, a union seeking to represent a successor's workforce should be required to follow the normal methods of establishing its representation rights by petitioning for and winning an NLRB election. If a majority of the successor's employees do, in fact, support the predecessor's union, it will be an easy matter for that union to promptly obtain authorization cards from that majority, seek recognition from the successor and, failing voluntary recognition, petition the NLRB for an employee election. Not only is this the preferred method of establishing representation rights, it will usually be quicker and more effective than asserting and litigating unfair labor practice charges based on "presumptions" of majority support. See *Linden Lumber, supra*, 419 U.S. at 306-307. As a consequence, requiring the predecessor's union to proceed in this manner will serve the dual NLRA policies of ensuring free choice to employees and implementing their choice in the fairest and most expeditious manner possible. The Chamber respectfully urges this Court to adopt such a rational approach and thereby foreclose the Board's perversion of the successorship doctrine which is illustrated by this case.[14]

[14] A return to basic principles in this case has an added advantage: this Court will not have to become embroiled in the morass of trying to figure out why an ineffective bargaining demand in October automatically became effective in January, why the Board concluded that Local 292's majority status should have been determined in January when Fall River's fixed hiring plans indicated that it would be doubling its workforce in two to three months, why Fall River's bargaining obligation did not cease when a majority of its workforce was no longer made up of former Sterlingwale employees, how the Board can find an NLRA violation based upon a charge, complaint and answer filed when there was no violation, etc., etc.

B. The Board Has Compounded Its Misapplication Of *Burns* By Relying On The Doctrines Of "Representative Complement" and "Continuing Demand"

It is clear from the preceding section that the Board premised its decision, in the first instance, on the factually unsupported presumption that the former Sterlingwale employees hired by Fall River wanted Local 292 to represent them. However, even that unwarranted extension of *Burns* would have created no bargaining obligation for Fall River had the Board not compounded its error by relying on theories of "representative complement" and "continuing demand."[15] We elaborate below.

It is apparent from this Court's *Burns* decision that the Court contemplated that determinations of a union's majority status in successorship cases would be based on the successor's full complement of employees:

> In [some] situations . . ., it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit. . . .

[15] The Board's "representative complement" doctrine was first developed in NLRB representation cases in which the Board had to decide whether to hold a representation election or to dismiss the union's petition for an election. It is applied primarily in two contexts: when an employer contends that an election would be inappropriate because the proposed voting unit will change substantially in the relatively near future (e.g., *Endicott Johnson De Puerto Rico*, 172 NLRB 1676 (1968)), or when a union contends that its petition and election should not be barred by the existence of a collective bargaining agreement that was entered into at a time when the employer did not employ a representative complement of the bargaining unit (e.g., *General Extrusion Co.*, 121 NLRB 1165 (1958)).

The Board's "continuing demand" theory, on the other hand, is simply a legal presumption that once a union demands recognition, that demand continues indefinitely into the future and results in an 8(a)(5) violation if circumstances later arise that make the demand legitimate.

406 U.S. at 295. Had the Board followed that direction in the instant case, it would have concluded that Fall River had no duty to recognize and bargain with Local 292 because, even assuming that all previously represented employees of Sterlingwale supported Local 292 representation, they constituted but a minority of Fall River's full workforce. And the resulting dismissal of the refusal to bargain complaint against Fall River would have been proper whether or not over 80 percent of Fall River's employees signed a petition disclaiming support for Local 292. See n. 8, *supra*.

The Board did not do that, however. Instead, it reached back chronologically into Fall River's hiring process and determined that the Company now has to bargain with Local 292 regarding its 106-employee workforce because there was a point in that hiring process when former Sterlingwale workers constituted a majority of a "representative complement" of the Fall River workforce.

There are at least five reasons why this Court should rule that any presumptions of "majority support" in successorship cases must be based on the successor's full complement of employees rather than on a representative complement.[16] First, basing majority determinations on a representative complement in successorship cases distorts the *Burns* doctrine by piling presumption upon presumption. Indeed, here the Board found "majority support" for Local 292 only by adding together two unsupported, rebuttable presumptions and then concluding that the result was irrebuttable. Specifically, the Board had to presume initially that at least 28 of the 36 for-

[16] The above rule is intended to cover contested cases only. If a union presents evidence to a successor employer that it represents a majority of a representative complement, that employer is free to voluntarily recognize and bargain with that union. If the successor refuses, however, the union must file a representation petition with the Board. *Linden Lumber, supra.*

mer Sterlingwale employees hired to make up Fall River's January 15 "representative complement" of 55 employees supported representation by Local 292. As shown above, there was no factual basis in the record for that presumption. The Board then had to presume that at least the same percentage of the remaining 51 employees hired by mid-April to complete Fall River's complement of 106 employees supported Local 292 representation. There is nothing in any of the decisions below, the record, logic or common sense that supports that presumption.[17] Finally, even though each of these two presumptions is normally rebuttable by a showing that a majority of employees do not, in fact, support union representation (*Burns, supra*, 406 U.S. at 279 n. 3), the Board combined the two into an irrebuttable conclusion. Specifically, the Board concluded that Local 292 represented a majority of Fall River's full workforce even though former Sterlingwale employees constituted a minority of that group and even though over 80 percent of those employees had signed petitions rejecting representation by Local 292. As a result, the Board ordered Fall River to bargain with a union that likely never represented a majority of Fall River's employees and certainly represented fewer than 20 percent of them by the time Fall River had hired a full complement.

Second, waiting until an employer reaches a full complement before presuming majority support will do less violence to the goal of speedy representation determinations than the alternative rule would do to employee free choice.[18] It is not unusual for a successor employer to

[17] In fact, given that less than 20 percent of the workers in the United States are union-represented (e.g., Labor Relations Yearbook—1984 (BNA 1985), p. 298), if one is going to presume anything, it is more reasonable to assume that over 80 percent of those additional hires did not support Local 292.

[18] Even when the NLRB determines "majority status" based on the successor's full complement, the Board will be merely presuming that all the predecessor's former employees support union representation. However, at least the Board does not have to add a second unsupported assumption to that analysis—i.e., that subsequent hires support the union in the same percentage as initial hires who make up the representative complement.

plan from the outset a gradual, but definite, start-up plan for its new business, especially where, as here, the predecessor employer has gone completely out of business long before the successor begins operations. For example, when Fall River had hired a representative complement as of January 15, 1983, it was still hiring and would be fully staffed within three months in accordance with its initial start-up plan. Given those firm hiring plans and the short period of time before hiring was to be completed, it would have done little violence to the need for a quick representation decision to have waited, rather than to have emasculated the majority rule concept in order to impose union representation on employees some three months earlier. Indeed, a decision to wait in this case would have been consistent with the Board's general approach when the time between initial hiring and the planned full complement date is relatively short. E.g., *Pacific Hide & Fur Depot, supra; Premium Foods, Inc., supra*, 709 F.2d at 628.

Third, and somewhat related to the second point, it makes no sense to require a successor employer to recognize and bargain with a predecessor's union based on presumed majority support in a representative complement when that employer knows full well that it will reach a full complement within a few months and that the predecessor's employees are unlikely to constitute a majority of that full complement. For example, the First Circuit below suggested that Fall River could have avoided violating the NLRA by recognizing Local 292 on January 15, bargaining until it was clear that the Union no longer represented a majority of Fall River's workforce, and then withdrawing recognition (P.A. 16).

That otherwise legitimate comment illustrates why it makes little practical sense to require a successor to automatically bargain based on the number of predecessor employees in a representative complement. No employer can engage in meaningful bargaining when it knows that a few weeks or months down the road it will no longer recognize the union, and the Board itself has recognized that reality:

> Clearly, no meaningful bargaining can take place when at the same time the [employer] is contesting its bargaining obligation.

John Singer, Inc., 197 NLRB 88, 90 (1972). The same rationale would obviously apply here, yet the Board's holding in this case encourages (indeed, requires) such meaningless bargaining until a successor reaches its full employee complement.

Fourth, it is arbitrary and unfair to require an employer, under threat of an unfair labor practice finding, to determine the precise point in time that its workforce has reached a representative complement or for the NLRB to make a *post hoc* determination on that issue. In this regard, it is important to realize that the Board has established no hard and fast rules for determining when an employer has hired a representative complement of employees. See, e.g., *General Cable Corp.*, 173 NLRB 251 (1968); *Endicott Johnson De Puerto Rico, supra; Herman Brothers, Inc.*, 264 NLRB 439 (1982); *Hayes Coal Co., Inc.*, 197 NLRB 1162 (1972). Accordingly, prior to hiring a complete workforce, every successor employer runs the risk of violating Section 8 (a) (2) if it recognizes a union too soon or violating Section 8(a) (5) if it withholds recognition too long. *See Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977), *decision after remand*, 629 F.2d 305 (1980), *cert. denied*, 450 U.S. 996 (1981).

Moreover, this problem for successor employers is exacerbated by the Board's application of its "continuing demand" theory. Absent that theory, an employer would be required to make this difficult and uncertain decision only at a time when the predecessor union makes a demand for bargaining. When such a demand is deemed continuing, however, the successor must make that decision daily. For example, here the Union made its one and only demand for recognition on October 19, 1982 when Fall River had no right or obligation to recognize and bargain with it. Under the Board's "continuing demand" theory, that demand thereafter remained effective and, as a consequence, could automatically result in Fall River violating Section 8(a) (5) on an uncertain date sometime in the future when its hiring reached the undefined level necessary to constitute a representative complement. Accordingly, Fall River was required to decide every day thereafter whether it should recognize the Union and possibly violate Section 8(a) (2) of the Act, or withhold recognition and possibly violate Section 8(a) (5). Surely, nothing in the Act requires that employers be placed in such a dilemma. See *Hedstrom, supra.*[19]

Finally on this point, it is important to realize that the Board's normal application of its representative com-

[19] The unfairness of the "continuing demand" theory is particularly evident in this case. When the union filed a charge with the Board, Fall River decided it would withhold recognition, and it was right as a matter of law. When the Board issued a complaint and when Fall River later answered that complaint on January 4, it made the same decision, and it was right again. According to the Board, however, eleven days later (on January 15) Fall River automatically violated the Act by doing nothing. One wonders how Fall River could prepare its defense in this case under these circumstances. Accordingly, we agree with NLRB Member Hunter's dissenting opinion in this case that a union's bargaining demand should not be considered effective or continuing unless made at a time when the employer had an obligation to honor it (P.A. 33). At the very least, the Board should limit its "continuing demand" theory to situations in which that demand becomes effective and creates a violation of the Act *prior* to the time the Board issues its complaint alleging that the Act has been violated.

plement doctrine (see n. 15, *supra*) does not create this kind of untenable situation for employers that have engaged in no wrongdoing. For instance, if a union demands recognition based on a card majority in an alleged representative complement, the employer normally has a right to refuse recognition and insist that the union file a representation petition with the NLRB. *Linden Lumber*, *supra*. In that event, the Board itself will decide the representative complement issue in the course of processing that petition. However, the fact that application of the representative complement doctrine may be fair and reasonable in the context of an NLRB representation case does not support the Board's apparent belief that the doctrine can be legitimately applied in a wholesale fashion in all contexts. And in particular, it does not mean that the doctrine should be applied in successorship cases, where the automatic bargaining obligation based on a presumption of majority support will force an employer to guess at its peril, on a daily basis, whether the NLRB would determine that its workforce has now reached a representative complement.

Fifth, and finally, there is a simple answer to all of these problems created by application of the "representative complement" and "continuing demand" theories in successorship cases, and it is an answer that concomitantly serves the twin NLRA goals of ensuring union representation on an expeditious basis but only when a majority of affected employees desire such representation. Specifically, if the facts in a successorship case reveal that a substantial period of time will elapse before a full complement is hired, the union claiming majority support of a representative complement may file a representation petition and allow the Board to hold an election to determine whether, in fact, a majority of that representative complement supports union representation. E.g., *General Cable Corp.*, 173 NLRB 251 (1968); *Endicott Johnson De Puerto Rico*, 172 NLRB

1676 (1968); *Burns*, *supra*, 406 U.S. at 297 (dissent). Even that approach requires the Board to presume that the additional hires will support union representation in the same percentage as the representative complement, but such an approach is at least based upon actual majority sentiment at the outset and mandates bargaining based upon a single, arguably supported presumption rather than on the multiple unsupported presumptions employed by the Board in the instant case.

Moreover, the election approach also solves the other problems created by the Board's "representative complement" approach in this and other successorship cases. It permits employees to seek and obtain union representation as quickly as they desire if the successor has a representative complement. It relieves the successor from having to guess whether a representative complement has been hired because the Board itself will determine that question before holding an election. And if an election is held and the union is chosen to represent the successor's employees, the successor may go forward and bargain with that union in good faith knowing that the union's representative status will not be shortly defeased by the completion of the successor's hiring process. See *Brooks v. NLRB*, *supra*.

In sum, the Chamber submits that if the Court is inclined to presume that all of a predecessor's union-represented employees who are hired by a successor support union representation in their new employment, this Court should rule that the "majority status" of the union based upon that presumption shall be determined only when the successor hires its full complement of employees and that "majority status" prior to that date shall be determined by the results of an NLRB election held in a representative complement.[20] Had that rule

[20] Indeed, as we have argued earlier, it makes more sense and more truly meets the majority rule policy of the Act to require an election in any successorship case, even after a full complement has been hired. *A fortiori*, it makes more sense to do so when a union

been applied in the instant case, an election petition filed by Local 292 in October 1982 presumably would have been dismissed or withdrawn based upon the Board's explanation that Fall River had not hired a representative complement of employees. The Union could have then filed again after January 15, 1983 when a representative complement was hired and working.[21] An election would then have been held. If Local 292 had lost that election, this representation dispute would have ended. If Local 292 had won, Fall River would have long since recognized and bargained with the Union. Whatever the results of that election, however, Fall River would not have been required to walk an 8(a)(2)-8(a)(5) tightrope for months, it would not have been required to defend against an NLRB complaint that was baseless at the time it was issued, and its employees would not have had to run the risk of being saddled with a union they have not selected.

CONCLUSION

It is clear that the fundamental guarantees of the National Labor Relations Act have been significantly impaired by the NLRB's unwarranted extension of *Burns* in this and other successorship cases. Accordingly, the Chamber respectfully submits that the Court should establish the following guidelines for judging the bargaining obligations of successor employers. Whenever the

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claims to be the representative of a smaller employee complement which might be expected to contain a larger percentage of the predecessor's employees than would a full complement.

[21] If the former Sterlingwale employees continued to support Local 292, the Union should have had no difficulty learning that the full first shift was operating by that time and that a representative complement might then have been employed by Fall River. In fact, Local 292 would likely have been made aware of Fall River's hiring plans when its initial petition was dismissed and, accordingly, would have had an idea when a representative complement was anticipated by the Board. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11100.1, 11100.2.

facts reveal that a successor has hired only a representative complement of its planned workforce, a union seeking to represent those employees should be required to petition for and win an NLRB election if it wants to represent the successor's workforce before a full complement is hired. When the facts reveal that the successor has hired a full complement, the union should be required to petition for and win an election unless a majority of that full complement previously worked in the predecessor's union-represented workforce *and* there is a strong factual basis for presuming that those former employees of the predecessor desire continued representation by that union. Because the facts in this case meet none of these criteria, the Chamber respectfully submits that the Board's decision requiring Fall River to bargain, as enforced by the First Circuit, should be overturned and denied enforcement.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FALL RIVER DYEING & FINISHING CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On A Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE UNITED TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE UNITED TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 93 national and international unions with a total membership of approximately 13,000,000 working men and women, and by the United Textile Workers Union of America, AFL-CIO, the AFL-CIO affiliate whose local union represented the employees involved in this case, with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The central issue in this case concerns the propriety of the rules the NLRB has established for determining whether a successor employer has a bargaining obligation in situations in which the successor does not begin full production until some time after taking over the employing enterprise. While the issue is thus a fairly narrow one, its proper resolution requires considerable attention to the overall scheme of the Act regarding representation determinations, and to the development of successorship principles as part of that larger scheme.

I. A. Last term, in *NLRB v. Financial Institution Employees of America* (*"FIEA"*), —— U.S. ——, 106 S.Ct. 1007 (1986), this Court addressed the principles generally applicable to the establishment and maintenance of bargaining relationships under the NLRA. In summary, those principles are: First, where there are disputes about initial recognition, an employer is entitled to insist upon a Board-conducted election. Second, once it becomes an incumbent, a union need not reestablish its majority periodically, or whenever its majority is questioned. Third, the Act does recognize that changed circumstances may erode union support, and therefore provides for formal employer or employee-instigated and Board-conducted elections, available only upon the requisite showing of a question concerning representation. And, fourth, it is through the use of those election procedures that are invoked on a showing of *evident employee dissatisfaction*, and not by the self-help method of refusing forthwith to bargain, that employers are to raise questions concerning a union's continuing majority support. This statutory scheme incorporates substantive policy decisions designed to promote orderly collective bargaining while preserving ample opportunity for the expression of employee free choice; the rules just outlined do *not* depend upon factual presumptions of an evidentiary kind concerning a given employee group's likely sentiments upon union representation at a particular time.

B. The question presented in a successorship bargaining case is how these general principles apply to a situation in which there has been a change in the ownership of the employing enterprise. Employing entities are in constant flux; if changes in management, supervision, methods of production, products, or shift configurations, to give some examples, sufficed automatically to displace an incumbent union, nothing would be left of the Act's goal of establishing industrial stability. It is this understanding of work-place realities that underlies the Board's successorship doctrine. Since the Act provides that union representation decisions are made with regard to bargaining units and not with regard to the exact form of the business, the central questions in a successorship case concern whether the bargaining unit originally designated has survived the change in ownership and remains an "appropriate" unit for bargaining.

C. Against that background the question in this case becomes: in this overall scheme, what is the role of considerations relating to the composition of the successor's workforce? None of this Court's cases answers that question. And while the Board decisions are not a model of clarity, it appears that the "majority carryover" and "representative complement" rules invoked here were developed to single out a factor—continuity in the workforce—that is entitled to particular weight in a case like this one. However, there is no statutory reason that the carryover employees must constitute a majority rather than a substantial percentage. And, since the representative complement rule assures substantial carryover, that rule cannot be faulted as contrary to the statute or irrational.

II. The two other questions in the case are properly dealt with in short compass. Because the Board and the Court of Appeals, in treating with the non-workforce successorship criteria, followed a legal standard petitioner concedes is correct and did not grossly misapply that standard (*Universal Camera Corp. v. NLRB*, 340 U.S.

474 (1951)), there is no call for this Court to redetermine that issue. And while petitioner argues against the Board's continuing demand rule as applied in successorship cases, that rule makes practical sense, reflects the parties' relative access to pertinent information, and does not present employers with any untenable legal choices.

ARGUMENT

The precise question raised in this case is a quite technical one, directly pertinent only in the limited number of instances in which all of the following conditions are present: (1) an "employing enterprise" changes hands without altering those aspects of the operation that most directly affect employment conditions; (2) the successor employer does not begin total operations immediately but slowly expands toward a goal of full production; (3) at the time the successor secures a substantial and representative complement of employees—a concept, as we shall explain, derived from long-established Board law concerning when a bargaining obligation first arises—more than one-half of those employees were formerly employed by the predecessor; (4) the predecessor's employees were represented by a union that either had been certified as their exclusive bargaining representative by the National Labor Relations Board or had been recognized by the predecessor as such a representative; (5) the union makes a bargaining demand upon the successor, which is refused; and (6) no group of employees petitions the Board for an election to establish that the incumbent union does *not* represent a majority of the employees, and the employer is unable to point to any objective, reasonable basis for a good faith doubt as to whether the union represents a majority of the employees.

The NLRB has concluded that under these circumstances, the successor employer has a duty to bargain with the union, at least unless and until it is established by the otherwise applicable methods—primarily, a Board-

conducted election—that the majority of its employees do not in fact desire union representation.

Despite the narrowness of the precise issue presented, petitioner and the Chamber of Commerce of the United States as an *amicus curiae* approach that issue on the basis of sweeping premises which are demonstrably erroneous and which, if accepted, would gravely undermine the overall goals of the Act, both in successorship cases and otherwise. In particular, the Chamber of Commerce seeks to overturn the Board's rule that where the majority of the successor's employees were previously employed by the predecessor (and the other indicia of continuity in the employing enterprise are satisfied, *see* pp. 13-18, *infra*), the successor may not refuse to bargain, at least unless the successor has a good faith doubt based on objective, reasonable considerations concerning the successor employees' desires for union representation.[1] Chamber Br. at 14-19. In support of this position, the Chamber argues from the premise that "[t]he doctrine of 'successorship' has historically been one of the very limited exceptions to the rule that a union must prove its majority status through an election victory" (Chamber Br. at 12); the Chamber then proceeds to assume that this "exception" is based upon a *factual* presumption that if a majority of the successor's employees had been employed by a predecessor and had been represented by a union, then a majority of the successor's employees desire union representation. *See* Chamber Br. at 17 ("this Court's opinion in [*NLRB v. Burns International Security Services*, 406 U.S. 272 (1972)] turned on . . . the recent union election and certification which arguably provided a *factual basis* for presuming that a majority of Burns' employees *wanted to be represented by the union*" (*id.*, at 18, emphasis added)).

[1] For simplicity's sake, we hereafter call this principle the "majority carryover" rule; the corollary principle directly before

In fact, however, the "successorship" doctrine is not an anomalous exception to the majority rule principle, and the Board's "majority carryover" rule is not based on an evidentiary presumption of majority union support. Instead, the successorship doctrine is an integral part of a general scheme for determining not the majority's desires regarding union representation at a particular moment but *how often and under what circumstances those desires are to be ascertained.*

We therefore begin by exploring the general structure of the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, with respect to the relationship between an employer's obligation to bargain collectively and the employees' right to their choice on union representation. We then turn to the role of successorship principles in this overall structure. Finally, we demonstrate that the "majority carryover" rule and its corollary, the "representative complement" rule, comfortably comport with that role.

I

A. This Court had occasion last term to review, in a case raising issues analogous to those here, the general principles that also govern here. *NLRB v. Financial Institution Employees of America* (*"FIEA"*), —— U.S. ——, 106 S.Ct. 1007 (1986), like this case, involved the impact of changes within one of the two parties to the statutory bargaining relationship upon the continuation of that relationship; in *FIEA*, it was the labor organization rather than the employing enterprise that changed, in name and, to some degree, in structure. Despite this difference, the *FIEA* Court's observations about the Act's basic presuppositions concerning the impact of changed circumstances on the employees' representational choices are equally pertinent to this case.

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the Court—that majority carryover should be determined when the successor has hired a substantial and representative complement of employees—we term the "representative complement" rule.

First, *FIEA* confirmed (*see Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974)) that with regard to the *initial* choice concerning union representation, a Board-conducted election is the preferred means of ascertaining the employees wishes when an employer contests the union's claim of majority status:[2]

> Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing," 29 U.S.C. Sec. 157, and the Board is empowered to determine representation on petition of employees or the employer. 29 U.S.C. Sec. 159(c)(1)(A)(i), 159(c)(1)(B). In either case, the Board investigates the petition and holds a hearing if it has reasonable cause to believe that a "question of representation" exists, 29 U.S.C. Sec. 159 (c), and directs a representation election by secret ballot to settle the question. *Ibid.* The Board certifies the winning union as the bargaining representative of all the employees in the bargaining unit. The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative. 29 U.S.C. Sec. 158(a)(5). [106 S.Ct. at 1011.]

The Chamber of Commerce's contention that *Linden Lumber*'s holding that a union-initiated Board election is the inviolable norm simply disregards the initial recognition context to which that holding was carefully limited:

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[2] The case before the Court in *FIEA* concerned a union that was initially recognized after a Board-conducted certification election. Of course, nothing in the Act prevents an employer from voluntarily recognizing a union after being presented with evidence of majority support. The Board has consistently treated collective bargaining relationships established through voluntary recognition and relationships established through a certification in the same manner except that the bar to contesting the union's majority support after initial recognition runs for a "reasonable period" rather than for one year. *See NLRB* v. *Cayuga Crushed Stone Inc.*, 474 F.2d 1380 (2nd Cir., 1973); *Freeman Co.*, 194 NLRB 595 (1971).

> In terms of getting on with the problems of *inaugurating regimes of industrial peace*, the policy of encouraging secret elections is to be favored. The question remains—should the burden be on the union to ask for an election or should it be the responsibility of the employer? [419 U.S. at 307, emphasis added.]

Where the regime of industrial peace has previously been inaugurated, and the employer seeks to change the representational *status quo*, the burden of invoking the Board's election procedures shifts to the employer as we now show.

Although the Act thus provides explicitly for the manner in which disputes about initial union recognition should be settled, the statute "does not," as the Fifth Circuit observed in an oft-cited early case, "say how long a certificate of representation shall stand good." *NLRB v. Whittier Mills Co.*, 111 F.2d 474, 478 (5th Cir. 1940).[3] Rather, under the Act, the union's status as representative, once established,

> is not intended to be ephemeral, and nor should it be perpetual. On general principle, *since it ascertains a status as existing, the presumption is that that status continues until it is shown to have ceased.* The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered. *So long as the employees make no contention that they are not correctly represented,* it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent. [*Whittier Mills Co., supra*, 111 F.2d at 478; emphasis added.]

[3] In this respect the NLRA is singular: "In the political and business spheres, the choice of the voters in an election binds them for a fixed time." *Brooks v. NLRB*, 348 U.S. 96, 99 (1954). However, the statute does, since 1947, parallel our political system to the degree of requiring that at least one year elapse between successive representation elections. Sec. 9(c)(3), 29 U.S.C. § 159(c)(3); *see generally Brooks v. NLRB, supra.*

See also Bethlehem Steel Co., 73 NLRB 277, 280 (1947).

Thus, as *FIEA* recognized, the NLRA does not require an incumbent union to reestablish its majority status periodically, or whenever asked to do so by an employer or by any employee. Any such rule would be incompatible with "[t]he basic purpose of the National Labor Relations Act . . . to preserve industrial peace . . . [*by*] *encourag*[*ing*] *stable bargaining relationships.*" *FIEA*, 106 S.Ct. at 1016; emphasis added. *See* S. Rep. No. 573, 74th Congress, 1st Sess., 1-2 (1935) ("The first objective of the bill is to promote industrial peace. . . . It is . . . believed feasible to remove the provocation to a large proportion of the bitterest industrial outbreaks by giving definite legal status to the procedure of collective bargaining and by setting up machinery to facilitate it.") For, if "the union is . . . compelled to engage in endless election campaigning . . . uninterrupted and stable bargaining relationships would be impaired, and unions would be tempted to make unreasonable demands in order to retain the allegiance of employees." *U.S. Gypsum Co.*, 158 NLRB 652, 655 (1966); *see also Brooks v. NLRB, supra*, 348 U.S. at 99-100; Note, *The Bargaining Obligations of Successor Employers*, 88 Harv. L. Rev. 759, 760 (1975).[4]

At the same time, as *FIEA* went on to note, "[t]he Act recognizes that employee support may be eroded by changed circumstances" (106 S.Ct. at 1011), and accommodates that possibility by "establish[ing] a specific election procedure to decide whether the employees desire a change in a certified union's representative status" (106 S.Ct. at 1014):

[4] In addition, "due regard to administrative prudence" precludes requiring unions to continually re-establish majority support through resort to the NLRB-conducted statutory procedures. *Brooks v. NLRB, supra*, 348 U.S. at 103; *See also* S. Rep. No. 105, 80th Cong., 1st Sess., 12 (1947).

In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U.S.C. Sec. 159(c)(1)(A)(ii); 29 CFR Sec. 101.17, 102.60(a) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U.S.C. Sec. 159(c)(1)(B); 29 CFR Secs. 101.17, 102.60(a) (1985); see C.Morris, The Developing Labor Law 349 (2d Ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 NLRB 652, 656 (1966); 29 CFR Sec. 101.17 (1985); see Morris, *supra*. Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U.S.C. Sec. 159(c). [106 S.Ct. at 1011.] [5]

See also Brooks v. NLRB, *supra*, 348 U.S. at 100-01, 103.

Finally, *FIEA* confirmed that ordinarily it is not the role of an employer "to vindicate the rights of his employees' by refusing to bargain." *Brooks v. NLRB*, *supra*, 348 U.S. at 103. For "any uncertainty on the employer's part concerning an incumbent union's majority status does not relieve him of his obligation to bargain collectively." *FIEA*, 106 S.Ct. at 1017. Rather,

> If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. . . . To allow employers to rely on employees' rights in refusing

[5] As the Court also noted in *FIEA*, "the Board will consider 'decertifying' a union only if at least 30% of the employees present a petition, or in 'extreme cases.'" 106 S.Ct. at 1010 n.3.

> to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it. [*Brooks v. NLRB*, *supra*, 348 U.S. at 103, *quoted in part in FIEA*, 106 S.Ct. at 1017.] [6]

[6] Despite this Court's warnings about the dangers of allowing employers to refuse to bargain with an established exclusive representative in order to vindicate their employees' representational rights, the Board has not reconsidered in recent years the rule of *Celanese Corp. of America*, 95 NLRB 664 (1951), allowing an employer to refuse to bargain if the employer has a good faith doubt of an incumbent union's majority support. But the "employer self-help" (*Brooks v. NLRB*, *supra*, 348 U.S. at 103) allowed by the *Celanese* rule is, we submit, plainly incompatible with the Act's provisions regarding Board-conducted elections, as interpreted in *Brooks* and in *FIEA*.

Moreover, at the time the *Celanese* rule was adopted, the Board was of the general view that "good faith" doubt as to a union's majority status stated the proper standard in failure-to-bargain cases generally. *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950). The good faith doubt standard has since been abandoned in initial bargaining situations, at least in part because of the difficulties inherent in examining an employer's motivations. *Linden Lumber Div. v. NLRB*, *supra*, 419 U.S. at 306; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 592-93 (1969). Instead, the Board now maintains, with this Court's approval, that, in an initial recognition situation, the party seeking to disturb the *status quo* with regard to union representation—in that instance, the union or the employees who seek union representation in a previously unrepresented unit—is required to resort to the formal Board-conducted election procedures in order to establish its position no matter how strongly the available facts support its claim and belie the other party's "good faith" doubt. *Linden Lumber Div.*, *supra*.

The problems with a good faith doubt standard do not vary depending upon whether it is the employer or the union that is seeking to avoid resort to the Congressionally-established "formal mode for selection and rejection of bargaining agents." *Brooks v. NLRB*, *supra*, 348 U.S. at 103. Thus, equity as well as logic support the view that just as employers may insist upon resort to the Act's formal processes when unions seek to establish union representation in a unit in which there has not been such representation previously, so unions may insist that employers (or employees) who seek

It is important to the decision of this case to recognize also that while referred to as "presumptions of majority support" (*e.g.*, *FIEA*, 106 S.Ct. at 1010 n.3), the statutory and Board determinations concerning the timing and manner of resolving disputes concerning the continuing representative status of incumbent exclusive representatives are not *factual* presumptions of the sort used in litigation to establish certain facts that are difficult for the party who has the burden of proof to establish.[7] Rather, these NLRA rules represent substantive policy decisions "designed to promote stability in collective bargaining relationships, without impairing the free choice of employees." *Terrell Machinery Co.*, 173 NLRB 1480 (1969), *enforced* 427 F.2d 1088 (4th Cir.), *cert. denied* 398 U.S. 929 (1970). That being so, the test for their validity is not whether in a given situation it is more likely than not that the employees at work at the time desire continued representation, but whether those rules provide the measure of access to the Board's election processes that best effectuates all of the NLRA's variegated policies.

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to disestablish an incumbent union must also resort to the specified statutory procedures.

This case, however, does not directly present any issue regarding the propriety of a good faith doubt defense to a refusal-to-bargain charge, since Fall River has never asserted that *at the time the Board found that Fall River illegally refused to bargain* the employer had any objective, reasonable grounds for asserting that the union did *not* represent a majority of its employees. Consequently, the question of whether the *Celanese* rule comports with the Act's structure and logic is not directly presented here.

[7] Such "a presumption is a device by which proof of one fact—the so-called 'basic fact'—must be taken for some purposes as proof of another fact—the 'presumed fact.'" 21 Wright & Graham, *Federal Practice and Procedure*, § 5122, p. 561 (1977). *See generally id.* at § 5123; *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 45 (1st Cir. 1981) (the presumption that a certain kind of unit is appropriate is a substantive, not a procedural, presumption). *See also* Federal Rule of Evidence 301.

For example, as noted in *FIEA*:

> [I]n cases in which the employer is charged with refusing to bargain with a certified union, the union enjoys a presumption of majority status. For the first year after certification, this presumption is irrebutable. *See Brooks v. NLRB*. . . . [106 S.Ct. at 1010 n.3.]

While *Brooks* provides a number of justifications for barring tests of majority support entirely within a year of a certification, all of those justifications involve considerations relevant to the effective functioning of the Act as a whole. 348 U.S. at 99-100. At no point does *Brooks* suggest that the basis for the "presumption" is that, as a factual matter, majority support for a union is unlikely to erode within a year; on the contrary, the reasons given largely involve a concern that unless insulated from attack, majority support might well erode in the first year —for reasons having nothing to do with the merits of the representation question and having everything to do with the delay in collective bargaining occasioned by another Board election—as happened on the facts of *Brooks* itself. *See also General Cable Corp.*, 139 NLRB 1123 (1962) (giving policy reasons to justify a bar on representation elections during the term of a collective bargaining agreement of up to three years duration); *NLRB v. Sanson Hosiery Mills*, 195 F.2d 350, 352-53 (5th Cir. 1952).

B. The question presented in successorship bargaining cases such as this one is how these general principles apply to a situation in which there has been at least a change of ownership in the employing enterprise, and perhaps other accompanying changes as well. Once again, the analogy to *FIEA* is helpful in understanding the ramifications of the question, and in suggesting the correct answer.

The problem presented in *FIEA* was whether an affiliation of an independent union with a national union,

without more, allows the Board to "effectively decertify[] the reorganized union." 106 S.Ct. at 1014. The Court recognized that given the prevalence of organizational and structural changes within labor unions, any such rule would do a grave disservice to the Act's overall purposes:[8]

> [T]he Board's decision must take into account that "the industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining relationship." [Citation omitted]. In many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation. In such situations, affiliation does not necessarily implicate the "selection" of the bargaining representative. The reorganized union may legitimately claim to succeed as the employees' duly selected bargaining representative, and in that case retains a legitimate interest in continuing to bargain collectively with the employer. The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question concerning representation. [106 S.Ct. at 1014; emphasis in original.]

Like labor unions (but perhaps to an even greater degree), the entities that are employers under the NLRA are in a constant state of flux. Management changes, facilities are altered, new products, requiring new methods of production, are introduced, departmental structures are reorganized, shift configurations are altered, etc. Obviously, if every such entrepreneurial change were

[8] *See* 106 S.Ct. at 1015:

> [M]any organizational or structural changes may operate to alter a union's "identity." This would be the case where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction. The fact that an affiliation is often accompanied by a formal name change does not serve to distinguish it from other organizational developments.

to void the incumbent status of any labor unions representing affected bargaining units, "the industrial stability sought by the Act" would not simply be "disrupted" but destroyed.

That being so, the Board, relatively early in the Act's history, adopted the principle, confirmed by this Court in *NLRB v. Burns*, *supra*, 406 U.S. at 279, that "a mere change of employers or of ownership is not such an "unusual circumstance" as to affect the force of the Board's certification."[9] As the Board explained in one of its earliest successorship cases:

> Where, as here, no essential attribute of the employment relationship has been changed as a result of the transfer, the certification continues with undiminished vitality to represent the will of the employees with respect to their choice of bargaining representative and the consequent obligation to bargain subsists notwithstanding the change in the legal ownership of the business enterprise. . . . This is but the application of the settled principle that the industrial strife which the Act seeks to avoid or mitigate, and the validly instituted bargaining relationships which it seeks to foster, are "not less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.' [*Stonewall Cotton Mills*, 80 NLRB 325, 327 (1948).]

See also Maintenance, Inc., 148 NLRB 1299, 1302 (1964) ("It would be virtually impossible for employees to achieve collective bargaining rights . . . if with every change [in ownership] the employees must again resort to the Board's processes. . . . In our opinion it would best effectuate the policies of the Act if, in the circumstances here present, . . . the Union is left free to devote itself to its function as bargaining agent.")

[9] We note that on this point—although not necessarily on its application to particular circumstances—the dissenters in *Burns* were in accord with the majority. 406 U.S. at 305.

Thus, as in *FIEA*, the issue in a case concerning the bargaining obligations of a successor is not whether there is a basis for *erecting* a factual presumption of majority support, but whether there have been relevant changes so substantial in themselves as to *raise* a question concerning representation, and thereby to overcome the otherwise applicable rules governing invocation of the Board's election processes where there is an incumbent union.[10]

In the *FIEA* context, the pertinent factors in making this determination concern the continuity in the union's operating and governance structure. In the present context, the sorts of changes that are relevant, as *Burns* and the lower court cases relied upon there make clear, are those that go to the continuity of the relevant "unit appropriate for [collective bargaining] purposes" (§ 9 (a), 29 U.S.C. § 159(a)); for it is as the representative of that unit that the union was selected in the first

[10] Because the existence of a union representative is not a basis for making inferences about the desires of the employees presently in the unit regarding representation at any given moment, the question whether the original certification or voluntary recognition was recent or long past is not logically or legally relevant. *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 921 (1976).

Moreover where, as in *Burns, supra*, the change of employers takes place within a year of Board certification, the *consequences* of requiring that the certified union be recognized by a successor are much more substantial than otherwise: Where the Board's certification year bar applies, the union's majority cannot be questioned even through an employer or employee-initiated Board election petition until the year is up. Under all other successorship circumstances, the obligation to bargain continues, but the employer or employees may obtain an election to test the union's majority status if the Board's standards for doing so are satisfied (The reason the certification year bar is the *only* absolute barrier to an election in the successorship situations is that under *Burns, supra*, it is only the obligation to bargain, and not any collective bargaining agreement, that devolves upon the successor employer. Consequently, there can be no initial contract bar in the successorship situation.) In light of these differences the date of the union's certification should not be regarded as a factor that cuts for or against a successorship finding.

instance. *Burns*, 406 U.S. at 281 ("where the bargaining unit remains unchanged" imposition of an obligation to bargain "with the incumbent union" is appropriate); *NLRB v. McFarland*, 306 F.2d 219 (10th Cir. 1962) ("our question is whether the 'succession' has changed the employing industry so as to render the certified bargaining unit inappropriate"), cited with approval ("[t]his is the view of several courts of appeals and we agree with those courts") in *Burns*, 406 U.S. at 279, 281; *NLRB v. Tom-A-Hawk Transit, Inc*, 419 F.2d 1025 (7th Cir. 1969), cited with approval in *Burns*, 406 U.S. at 281; *see also Maintenance, Inc., supra*, 148 NLRB at 1300.

This standard draws upon an area of NLRA law—the considerations that govern the appropriateness of bargaining units—that is well-developed, and as to which the Board has particular expertise. *See, e.g., South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805 (1976). Further, the delineation of the bargaining unit assists in identifying those aspects of the work environment that were deemed relevant to the employees' working life when the unit was designated in the first place, and that are more likely than other factors to affect the employees' working interests on an ownership change. For example, if a separate unit was designated for a particular department and that department is dissolved by the new owner, then the departmental reorganization might well be critical; on the other hand, if the unit selected was an employer-wide unit, then internal reorganizations of this kind would not be likely to be a fundamental change sufficient to indicate that the original bargaining unit no longer exists.

This general approach coexists comfortably with the other holding of *Burns, supra*: that a successor employer is not bound by the terms of any collective bargaining agreement entered into between an incumbent union and a predecessor employer, including any terms pertaining to the hiring or retention of employees. Because the *Burns*

holding frees the successor-employer from *any* obligation to retain the "corporate structure, composition of the labor force, work location, task assignment, and nature of supervision" deemed necessary to a successful venture (406 U.S. at 288), it is fair to regard substantial similarities between the old operation and the new one as indicating a conscious decision, or economic need, to build upon, and continue, the existing employing enterprise. Because *Burns* provides that the only collective bargaining-related obligation that survives a change in ownership is the obligation to negotiate, no policy considerations pertaining to the need for potential investors to have a free hand in reordering a business are here relevant. For *Burns* thereby permits a successor employer to institute at the outset such operational changes as the successor deems warranted. Of course, no employer has any protected entrepreneurial interest in operating nonunion, since bargaining with a properly selected exclusive representative is a statutory obligation.

C. Given the arguments made by petitioner the question then becomes what is the role, in applying this general standard of successorship, of considerations that relate to the composition of the successor's workforce. It is critical in answering that question to understand at the outset that *none* of this Court's cases definitively answer that question.

Thus, while *Burns*, *supra*, does rely at several junctures upon the fact that a majority of the employees in the successor bargaining unit had been employed by the predecessor, the *Burns* opinion also quotes, without disapproval, the contention of Board counsel in that case that a majority carryover of employees may not always be necessary to establish a bargaining obligation on the part of a successor employer. 406 U.S. at 281 n.6 ("It has to be a substantial number . It has to be enough to give you a continuity of employment conditions in the

bargaining unit.")[11] Further, although petitioner contends to the contrary, *Burns* plainly does not settle the representative complement question either; the statement that "it *may* not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union" (*id.* at 295, emphasis supplied), is certainly not the grammatical equivalent of a statement that a bargaining obligation *never* arises short of the hiring of a full complement of employees.[12] Similarly ambiguous, and apparently intentionally so, is the only relevant reference in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973): In that case, the Court said that "the purchaser, if it does not hire *any or a majority* of [the predecessor's employees] will not be bound by an outstanding order to bargain . . . (414 U.S. at 184 n.6), but did not decide whether "any" or "a majority" is required. *See also John Wiley & Sons v. Livingston*, 376 U.S. 243, 263 (1964) ("relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of employees"); *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 263 (1974) ("substantial continuity in the identity of the workforce across the change in ownership" is necessary to "continuity of identity in the business enterprise").

The Board's decisions throw little additional light on the matter. At least until *Burns* was decided, the Board had not taken the position that a majority carryover is a *sine qua non* of successorship. Rather, while majority

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[11] In *Burns*, the majority carryover almost the only evidence of continuity between the predecessor and successor bargaining units; it is therefore not surprising that the Court placed great emphasis on this factor.

[12] The representative complement statement in *Burns* concerned a problem that was not directly before the Court; that, of course, is why it was possible to leave the question open, which is, it appears, what the Court intended to do.

carryover was viewed as perhaps the most important evidence that the former bargaining unit continued in existence (*see, e.g., Georgetown Stainless Mfg. Corp.*, 198 NLRB 234 (1972), a majority was not regarded as indispensable. Indeed, as noted, Board counsel at the argument in *Burns* specifically declined to take the position that majority carryover is essential.

Shortly after *Burns* was decided, however, a Board majority, over two vigorous dissents, did for the first time hold that unless there is majority carryover of employees, there is no successor bargaining obligation. *Spruce Up Corp.*, 309 NLRB 194 (1974); *see also The Boeing Co.*, 214 NLRB 541 (1974). The principal basis for this position, however, was not the Board's independent judgment, but that the "clear import" of this Court's opinions in *Burns* and in *Golden State* is that a majority carryover is required. 209 NLRB at 196; *see also id* at 200 (Member Kennedy, concurring in part and dissenting in part). Yet, as we have seen, *Burns* says nothing of the kind.

The upshot of the foregoing is that no clear reason has been articulated for separating out from the complex of factors relevant to determining whether the bargaining unit has survived across a change of ownership, the requirement that there must be a majority carryover of employees. And since, as we have seen, the office of a successorship determination generally is not to make specific predictions about the views of the current employees upon union representation but to determine whether the previously designated bargaining unit has survived, there is no *statutory* reason that requires a rule stating some magical percentage of carryover employees. Rather the position that the Board had come to on its own initiative at the time of *Burns*—that employee carryover is a highly relevant factor in determining whether the bargaining unit has survived over a change in ownership and that there "has to be enough [carryover] to

give you continuity of employment conditions . . ." (406 U.S. at 281 n.6)—is the one that best effectuates the policies of the Act.

The representative complement principle is one evidently borrowed from a concept developed in the initial representation context, and designed "to protect the [representational] rights of those who are working, as well as those who are to work in the future." *Herman Bros., Inc.*, 264 NLRB 439, 441 (1982); *see also Walnut Ridge Mfg. Co.*, 80 NLRB 1196, 1197 (1948) (the Board will permit an election in a substantial and representative unit because "[w]e are reluctant to deprive the employees presently employed of an opportunity to select a bargaining agent"). There must, of course, be some rule to determine when, during an enterprise's evolution, it is proper to hold a Board-conducted election. And petitioner has made no showing that the representative complement rule is unsound in the initial recognition situation. It is plain, moreover, that in the successorship context, the goal of assuring representation as promptly as possible is even stronger than in the initial recognition situation. For, in that situation there has been a Board election (or voluntary recognition of the union's majority) and the question is whether the bargaining relationship based on that test of employee sentiment should continue and not, as in the initial recognition situation, whether an entirely new regime should be inaugurated. It follows that the Board's adoption of the representative complement rule in successorship cases can not be faulted.

II

The other two questions petitioner presents to this Court are of considerably less general significance, and we therefore deal with those questions in brief compass.

A. Petitioner faults the Board's application of the applicable successorship criteria (other than those re-

lated to the composition of Fall River's workforce, discussed *supra*) to the sequence of events that resulted in Fall River taking over and operating the former Sterlingwale plant. As petitioner recognizes, "[t]his question is highly fact specific." Petition for a Writ of Certiorari at 8; *see also* Pet. Br. at 14; Chamber Br. at 13 n.10. The Court of Appeals carefully reviewed the evidence supporting the Board's determination that after the change of ownership, "the essential nature of the enterprise remain[ed] the same." 775 F.2d at 425, 429 (1985). That court's conclusion, after summarizing the evidence, was that "[t]he Board's finding in this case that the Company was substantially continuous to Sterlingwale is supported by substantial evidence in the record, considered as a whole." *Id.*, at 430.

Against that background, the application of the non-workforce successorship criteria to this case is an issue upon which "there is no justification for this Court's intervention, since *Universal Camera* [*Corp. v. NLRB*, 340 U.S. 474 (1951)] precludes [this Court] from substituting [its] judgment for that of the Court of Appeals." *Golden State Bottling Co. v. NLRB*, *supra*, 414 U.S. at 174. *See also Burns*, 406 U.S. at 280 n.5; *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). This is certainly not one of those "rare instances when the standard [of review] appears to have been misapprehended or grossly misapplied." *Universal Camera*, 340 U.S. at 491.

The legal standard applied here is precisely the one petitioner supports as "[t]he test established by this Court": "whether there is substantial continuity between the employing enterprises [, that is] whether there has been a change in the essential nature of the enterprise." Pet. Br. at 14. *Compare Golden State Bottling*, 414 U.S. at 182 n.5, quoting *Burns*, 406 U.S. at 306 (concurring and dissenting opinion of Rehnquist, J.) (whether "there is a continuity in the 'employing industry' ", including, particularly, " 'whether the new employer purchases a part or all of the assets of the predecessor employer' ").

Far from "grossly misappl[ying]" (*Universal Camera*, 340 U.S. at 491) that legal standard, the Board relied on the majority opinion in *Burns*, *supra* and the concurring and dissenting opinion in that case. *Compare* 406 U.S. at 280 n.4 ("continuation of the same types of product lines, departmental organization . . . and job functions . . . [and] perform[ance of] the identical services at the same facility' " are indicia of "continuity in the 'employing industry' ") with *id.* at 302, 306-07 (concurring and dissenting opinion of Rehnquist, J.) (rejecting imposition of a bargaining obligation where, as in *Burns*, the "only connection with the old employer is the hiring of some of the latter's employees and the performance of some of the work which was previously performed by the latter," but indicating that "employees are indeed entitled to a measure of protection against change in the employing entity where the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer").

In arguing that this Court should second-guess both the Board and the Court of Appeals on the application of an undisputed legal standard to the facts of a particular case, petitioner places particular emphasis upon the fact that Fall River did not begin operation immediately after Sterlingwale ceased production. In assessing that fact it is worth noting in the first place that while Sterlingwale laid off its production employees indefinitely in February, 1982, Sterlingwale did not *terminate* their employment. Indeed, it was not at all clear at that time, or until much later, that the lay-off was permanent rather than temporary. Pet. Br. at 3 (employees were laid off "indefinitely"); *id.* at 4 (as late as July, 1982, Sterlingwale's president discussed with union officials "a Boston merchant to assist in the financing to get the business back off the ground"). Rather, after the February 1982 lay-

off, Sterlingwale continued to employ a few nonproduction employees, and Sterlingwale did not actually "go under" until August, 1982. 272 NLRB 839, 840 (1984). Since Fall River began hiring employees in September, 1982, there was in reality a "hiatus" of about a month at most between the time it became clear to Sterlingwale's employees that Sterlingwale's cessation of production was permanent and the time hiring actually began at the former Sterlingwale plant for employees to do the same work—dyeing and finishing fabric—on the same machines at the same location.

The dispute, then, reduces to whether the Board can be faulted for refusing to regard this delay in reopening—or more generally delay of a certain specified magnitude—as in and of itself sufficient to show a lack of continuity in the employing enterprise. The proposition that *any* disjunction, no matter how short, between the operation of the previously established company and its successor is enough to show discontinuity in the employing enterprise, superseding all the other indications to the contrary, makes no sense. Employers frequently shut down plants for remodeling, retooling, reorganization, or simply lack of work, seasonal or otherwise. Employees laid off for such reasons will often be uncertain as to when, if ever, they will be recalled. Nonetheless, such closures and concomitant layoffs have not generally been regarded as indicating discontinuity of the bargaining unit, nor would any such rule be consistent with the statutory goals of minimizing representational disputes and preserving stable bargaining relationships. *See* pp. 14-15, *supra*. That being so, where there are other strong indicia of continuity in the employing enterprise, there is no basis for the rule that *any* hiatus in production whatsoever marks the demise of the original employing entity.

This is not to say that, based upon its experience in this area, the Board could not adopt a rule providing, for example, that upon closure of a plant for some reasonable,

specified time period, the employees of the closed plant hired by any new owner reopening a similar operation will normally be regarded as new employees in a new unit, whose desire for union representation must be proven anew. *Compare, e.g., Brooks v. NLRB, supra* (approving Board rule erecting a one year rule governing the preclusive effect of Board certifications).

The Board has not, however, chosen to adopt any such "hiatus" rule. Instead, the Board considers "hiatus" evidence one of many factors relevant to, but not individually determinative of, the question whether there has been such a substantial change in the employing enterprise that there is no continuity. *United Maintenance & Manufacturing Co.*, 214 NLRB 529, 532 (1974); *Aircraft Magnesium*, 265 NLRB 1344 (1982); *NLRB v. Band-Age, Inc., supra*, 534 F.2d at 5. This less rigid approach is surely neither irrational nor contrary to the statute, and is therefore perfectly permissible. *See, e.g., Beth Israel v. NLRB*, 437 U.S. 483, 501 (1978).

B. The other question raised by petitioner is whether the Board is precluded from regarding a union's demand for bargaining, made at a time when the employer had not yet hired a substantial and representative complement of employees, as a continuing demand that remains open until such a complement is established.[13] While the argu-

[13] The dissenting judge in the court of appeals relied heavily upon the fact that the substantial and representative complement was established as of a date after the charge, complaint and answer were filed. 775 F.2d at 440 (Torruella, J., dissenting); *see also* Pet. Br. at 32; Chamber Br. at 26 n.19. While unusual, this time sequence is not relevant to the issues before this Court.

Fall River never raised before the NLRB (or, for that matter, before the Court of Appeals) any procedural question relating to this chain of events (*see*, Respondent's Exceptions to Decision and Order of Administrative Law Judge, Joint Appendix ("Jt. App.") at 12), nor has the employer claimed, even now, any prejudice in defending the case as a result of the time sequence. (Indeed, it

ment that an employer should not be found to have committed an unfair labor practice by reason of rejecting a bargaining demand not valid when made is one with surface appeal, the argument disregards both practical considerations and the nature of an employer's limited obligation not to recognize a minority union.

First, in this case, as in many instances, the employer's refusal to bargain was unequivocal. Pet. Br. 7. In view of Fall River's contention that because of the circumstances surrounding its takeover of the Sterlingwale plant, Fall River is not a successor, its outright refusal to recognize is not surprising. But because this was, and is, Fall River's position, it would not have mattered if the union had made a bargaining demand daily; that request would still have been refused. Thus, at least where the employer's refusal to bargain is not premised solely upon the lack of an adequate complement of employees, the Board's continuing demand rule simply recognizes the practicalities of the situation, and refuses to condition the exercise of statutory rights upon futile formalities.

Further, it is the employer, not the union, who is in possession of the information concerning its ultimate production plans necessary to determine when an employee complement is representative. Under these circumstances, it is in no way unfair to place upon the employer, rather than the union, the burden of identifying the appropriate time to begin bargaining once the union's interest in bargaining has been expressed. *See United States v. N.Y., N.H. & H. R. Co.*, 355 U.S. 253, 256 n.5 (1957); *Campbell v. United States*, 365 U.S. 85, 96 (1961).

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does not appear that the employer raised the continuing demand question before the NLRB *at all*; rather, Member Hunter raised the question for the first time in his dissent.) Under § 10(e) of the NLRA, Fall River may not at this late date raise this question in this Court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Finally, and most importantly, the argument that an employer may not be required to make a judgment whether or not recognition is lawful or, instead, would violate § 8(a)(2) of the Act (*see* Pet. Br. at 32-35) is one with little force generally and in the present context. This dilemma, such as it is, is the product of the rule that an employer violates § 8(a)(2) even if the employer bargains with a union the employer believes in good faith to be a proper majority representative. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). But the *Garment Workers* decision rests on the recognition that, given the nature of the NLRA, no unfair dilemma is created by a purely objective standard:

> This conclusion [that no *scienter* is necessary to establish a § 8(a)(2) violation] places no particular hardship on the employer or the union. . . . [N]o penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union [bargaining demand], the validity of his decision may be tested in an unfair practice proceeding. If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. *No further penalty results.* [366 U.S. at 739-40; emphasis added.]

The continuing demand principle, whether in the present context, or in an initial recognition situation (*see, e.g., Hedstrom v. NLRB*, 558 F.2d 1137 (3d Cir. 1977), *cert. denied* 450 U.S. 996 (1981)), in no way changes or exacerbates the §§ 8(a)(2)/8(a)(5) "dilemma" this Court recognized to be inconsequential in *Garment Workers. Whenever* an employer is faced with a bargaining demand under circumstances in which he will violate § 8(a)(5) if the demand is refused, the "problem" exists. For example, if the union in this case had actually made a second, "timely" bargaining demand, the employer would still have had to decide whether or not the requi-

sites for a valid bargaining relationship existed at that time, and the employer could have been wrong. While the continuing demand rule may require the employer to make such decisions more than once on the basis of a single union request, that rule does not change the nature of the decision, or its possible labor law consequences, in any way.[14]

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[14] Moreover, the determinative information in this case is not whether or not a particular proportion of the workforce favors union representation, but whether or not the workforce consists in substantial part of the predecessor's employees. *See* pp. 12-13, *supra*. It is the employer who is entitled, under *Burns*, *supra*, and consistent with the applicable non-discrimination principles, to decide unilaterally whether the predecessor's employees will be hired and in what proportion; and *Burns* indicates that it is lawful for a successor employer to bargain with an incumbent union from the outset if the employer expects to retain the requisite proportion of the predecessors' employees. 406 U.S. at 295. Thus, the employer is in control not only of the pertinent information, but of the substantive factors governing its bargaining obligation as well. Under these circumstances, it is hardly unfair to ask the employer to behave in a way that comports with the plans he himself has made regarding personnel.